152 U.S. Rule 4

152 U.S. 81

Submitted Dec. 2

RECORD, CASE No. 15,102.

886

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~1132.~~ 787

CHARLES W. SHIVELY, PLAINTIFF IN ERROR,

vs.

JOHN Q. A. BOWLBY AND W. W. PARKER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED AUGUST 15, 1892.

RECORD, CASE No. 15,102.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1132.

CHARLES W. SHIVELY, PLAINTIFF IN ERROR,

vs.

JOHN Q. A. BOWLBY AND W. W. PARKER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 10, 1892.

a In the Supreme Court of the State of Oregon.

J. Q. A. BOWLBY and W. W. PARKER, Respondents,
v.
CHARLES W. SHIVELY (App.) and ANNIE M. SHIVELY, Defendants.

Be it remembered that under and pursuant to the order and direction of a writ of error sued out from the Supreme Court of the United States to the supreme court of the State of Oregon, which writ is herewith returned, I, the undersigned, clerk of the supreme court of the State of Oregon, herewith certify that on the 4th day of March, 1892, there was filed in my office a transcript on appeal in the above-entitled cause from a judgment entered in the circuit court of the State of Oregon for the county of Wasco, which said transcript comprises the record on appeal in said cause, and is a full, true, and correct copy of said transcript on appeal so filed with me, and is the record upon which the said cause was finally heard and determined in our said supreme court and upon which the final judgment of affirmance was entered in our said supreme court on the 18th day of June, 1892, and which said transcript is in words and figures following:

b In the Circuit Court of the State of Oregon for the County of Clatsop.

J. Q. A. BOWLBY and W. W. PARKER, Plaintiffs,
vs.
C. W. SHIVELY and ANNIE M. SHIVELY, Defendants.

Complaint.

1 In the Circuit Court of the State of Oregon for Clatsop County.

J. Q. A. BOWLBY and W. W. PARKER, Plaintiffs,
v.
C. W. SHIVELY and ANNIE M. SHIVELY, Defendants.

Plaintiffs allege that they are the owners and in possession, and have so been for more than fifteen years, of all the tide lands on the west one-half of block 141, on all of blocks 126 and 127 and north thereof, west half of block 146 and north thereof between the lines of low and ordinary high tide of the Columbia river.

That deeds for the same were issued by the State of Oregon to these plaintiffs more than ten years since.

That all of said premises have been during said time and now are within the corporate limits of the city of Astoria.

That the plaintiffs are the owners of all the wharfing rights and privileges and appurtenances in front thereof to ships channel of the Columbia river.

That they maintain and operate a wharf in front of block 127

extending several hundred feet into the Columbia river, at which ocean and river craft are wont to receive and discharge freight.

That, pretending to act under an act of the legislature of the State of Oregon entitled "An act to be entitled an act to authorize the city of Astoria to erect a sea wall and to grade the streets and construct sewers in connection therewith and to issue sea-wall bonds, and for other purposes relating thereto, and passed by the
2 house February 4th, 1891, and passed by the senate February 10th, 1891, and to be entitled to 30 act," defendants did, on the 7th day of April, 1891, execute and cause to be certified a written instrument of dedication, a copy of which is as follows, to wit:

In consideration of the grant to me in the Astoria sea wall charter act I hereby assent to all the terms of said act and dedicate to the public all my interest in all of the streets therein referred to, and especially those adjacent to the following-described property, viz: All those lots in blocks in the town of Astoria, Oregon, as laid out and recorded by J. M. Shively, together with all the property with and in front thereof to the ship channel of the Columbia river, known and described as follows:

Block 145, block 141 (except blocks 126 and 127), the west half of blocks 125 and 128, all lying north of blocks 146, 148, and 150; also all lying north of a strip of high land eight feet wide lying between the east lines of said town of Astoria and the east line of the donation land claim of John M. Shively and his wife, Susan L. Shively; also all lying north of what is known as Water street to the said ship channel and west of West Ninth street to the west line of said donation land claim; also all north of what is known as Water street, in said town of Astoria, to the said ship channel between West Third and West Fourth streets, in said town; also all of block 111, but no frontage thereof, and all north of block 144; and I, Annie M. Shively, wife of said Charles W. Shively, do hereby join in said dedication.

Witness our hands and seals this April 7th, 1891.

C. W. SHIVELY. [L. S.]
ANNIE M. SHIVELY. [L. S.]

Executed in the presence of us—
R. M. LOUDEN.
SIDNEY DELL.

[NOTARIAL SEAL.]

SIDNEY DELL,
Notary Public for Oregon.

3 That on the 8th day of April, 1891, they caused the same to be recorded on page 580, of Book 21 of Deeds, in the county records of Clatsop county, Oregon, said county being the same in which said land is situated.

That said instrument and acts of defendants are void and without authority, but are under form of law and cast and make a cloud upon plaintiffs' title to said premises claimed by them and greatly damage and injure them.

Wherefore plaintiffs pray that said acts and said instrument of writing, so far as they affect the premises of plaintiffs, be declared null and void.

That defendants be declared to have no title, right, or interest in said premises, and that they and each of them be perpetually enjoined from claiming any interest therein by reason of anything prior to this date.

That plaintiff- have such other and further relief as shall be meet and proper.

J. Q. A. BOWLBY,
Attorney for Plaintiffs.

STATE OF OREGON, } ss:
County of Clatsop, }

I, J. Q. A. Bowlby, being first duly sworn, depose and say that I am one of the plaintiffs in the above-entitled action, and that the foregoing complaint is true, as I verily believe.

J. Q. A. BOWLBY.

Subscribed and sworn to before me this 8th day of June, 1891.

____ ____,
Notary Public for the State Oregon.

4 Endorsed: Filed June 8, 1891. Complaint. C. J. Trenchard, county clerk. J. P. Dickenson, deputy.

5 *Summons.*

In the Circuit Court of the State of Oregon for the County of Clatsop.

J. Q. A. BOWLBY and W. W. PARKER, Plaintiffs,
v.
C. W. SHIVELY and ANNIE M. SHIVELY, Defendants.

STATE OF OREGON, } ss:
County of Clatsop, }

To C. W. Shively and Annie M. Shively, defendants:

In the name of the State of Oregon you are hereby required to appear and answer the complaint filed against you in the above-entitled action within ten days from the date of the service of this summons upon you if served within this county, or, if served in any other county of this State, then within twenty days from the date of the service of this summons upon you; and if you fail so to answer for want thereof the plaintiff- will take judgment against you for relief prayed for in this complaint.

The complaint will only be served upon defendant C. W. Shively.

J. Q. A. BOWLBY,
Attorney for Plaintiff-.

6 STATE OF OREGON, } ss:
County of Clatsop, }

I hereby certify that I received the within summons on the 8th day of June, 1891, and served the same within said State and county, on the 9th day of June, 1891, on the within-named C. W. Shively and Annie M. Shively by delivering a copy thereof, prepared and certified to by me, as sheriff, together with a copy of the complaint, prepared and certified to by J. Q. A. Bowlby, plaintiffs' attorney, to each of them in person.

H. A. SMITH,
Sheriff of Clatsop County, Oregon,
By J. J. KINNEY, *Deputy.*

Sheriff's fees, $4.80.

Filed 15th Sept., 1891.

Endorsed: Summons. H. A. Smith, sheriff, by J. J. Kinney, deputy.

7 *Demurrer by Plaintiffs.*

In the Circuit Court for the State of Oregon for Clatsop County.

J. Q. A. BOWLBY and W. W. PARKER, Plaintiffs,
v.
C. W. SHIVELY and ANNIE M. SHIVELY, Defendants.

Now comes the plaintiffs and demur to the answer of defendants (except so much thereof as refers to (the) south one-third of lots 7, 8, and 9 of block 141), for the reason that the same does not state facts sufficient to constitute a cause of defense.

J. Q. A. BOWLBY,
Attorney for Plaintiffs.

STATE OF OREGON, } ss:
County of Clatsop, }

I hereby certify that I received the within demurrer on the 20th day of June, 1891, and that I served the same within said county and State on the 20th day of June, 1891, by leaving a copy thereof at the office of the within-named defendants' attorney, Sidney Dell, in the city of Astoria, said county and State, having been unable after due and diligent search to find the said defendants' attorney, Sidney Dell, in said city, county, and State.

H. A. SMITH, *Sheriff.*

Sheriff's fees, $1.00.

8 Filed 20th day — June, 1891.

Endorsed: Demurrer by plaintiffs. C. J. Trenchard, clerk, by Thomas G. Boelling, deputy.

9 *Answer & Counter-Claim.*

In the Circuit Court of the State of Oregon for *the* Clatsop County, ss:

J. Q. A. BOWLBY and W. W. PARKER, Plaintiffs,
v.
C. W. SHIVELY and ANNIE M. SHIVELY, Defendants.

The defendants, answering the complaint of plaintiffs herein, deny that said plaintiffs or either of them are the owners of all or of any of the tide land on the west half of block 141 or on blocks 126 and 127 or of any of the tide lands north thereof or of any of the tide lands north of the west half of said block 146, between the line of ordinary low and ordinary high tide of the Columbia river, in the town of Astoria, Oregon, as laid out and recorded by John M. Shively, or any part thereof.

Deny that plaintiffs have been in possession of the said tide land on the west half of said block 141 or of any of the tide land north of blocks 126 and 127 for fifteen years or for any other or greater period than eight years, and deny that they are or have ever been in possession of the tide land north of the west half of said block 146 or of any part thereof.

Deny that deeds for said tide land or for any part thereof, except the tide land on the west half of said block 146, were issued by the State of Oregon to said plaintiffs more than ten years since or at all.

Deny that the plaintiffs are the owners of all or any of
10 the wharfing rights or appurtenances in front of said above-described tide land to ships' channel of the Columbia river or of any part thereof.

Admit that said plaintiffs maintain and operate a wharf in front of block 127, extending several hundred feet into the Columbia river, but not connected with block 127 except by Salmon street running back to the bank of said river, and have so maintained and operated the same for more than six years last past, the rental value of which said wharf is, and has been during all of said period, one hundred dollars per month.

Deny that the said deed of dedication for a railroad avenue and other streets is void or without authority, but admit that it creates some suspicion that plaintiffs have possession of defendants' property.

These defendants, for a further and separate and further answer and counter-claim herein, allege—

First. That on and prior to May 20th, 1854, John M. Shively and his wife, Susan L. Shively, were the owners in fee simple of the donation land claim number 38, notification No. 7852, in township 8 north, range 9 west, in sections 8, 9, 16, and 17, Willamette meridian, embracing all of the present city of Astoria, included within the limits of the town of Astoria, Oregon, as laid out and recorded by John M. Shively, under the act of Congress, dated Sep-

tember 27th, 1850, commonly known as the Oregon donation land law, and the U. S. patent therefor issued to them in 1865; that said donation land claim was bounded on the north by the Columbia river, and the said John M. Shively and his wife, Susan L. Shively, were then and there the owners of the riparian and wharfage
11 rights north of said D. L. C. from the ordinary high tide of said river to the deep ship channel thereof; and at the date of the passage of the act by the State of Oregon, on the 17th day of October, 1862, known as the wharfage act for towns and cities, and thereafter until after June 2, 1864, they were still the owners of block 141 and of block 4 of said town of Astoria down to the meander line of the Columbia river, and of all the riparian and wharfage rights thereto appertaining and belonging to said donation land claim, except those on blocks 146, 126, and 127 of said town of Astoria, and addition thereto, and all the rights of said John M. Shively and his wife therein have by mesne conveyances been conveyed to the defendant Charles W. Shively.

Second. That on the said 20th day of May, 1854, the said John M. Shively had laid out and caused to be recorded in the clerk's office of Clatsop county, Oregon, a plat of the said original town of Astoria, and also an addition thereto, described upon the recorded plat thereof as "Shively's addition to the town of Astoria," the said addition embracing all the property in controversy, which said plats were duly ratified by his said wife prior to the inurement of the title of the plaintiffs and the defendants herein alleged. By said plat of "Shively's addition to the town of Astoria" so laid out and recorded the said block 146 was 300 feet square, bounded on the east by East Fifth street, on the south by Hemlock street, on the west by East Fourth street, and on the north by Williams street, each of said streets being then and there 60 feet wide, and said block 146 lay below ordinary high tide of the Columbia river.

By said plat of Shiveley's addition so laid out and recorded the said block 141 was 300 feet square and divided into 12 lots
12 or 50 by 150 feet each, numbered from 1 to 12, beginning at the northeast corner of said block, the lots from 7 to 12 being the south tier, said block being bounded on the east by Salmon street, on the south by Wall street, on the West by West First street, and on the north by Cedar street, each of said streets being then and there sixty feet wide, and all of said block except the south one-third of lots 7, 8, 9, 10, 11, and 12 lay below ordinary high tide of said Columbia river, but the said south one-third of each of said lots lay above the said ordinary high tide of said river; also by said plat of the original town of Astoria block 9 was of equal size as block 141 and subdivided in like manner and lay due south of said block 141 and entirely above said ordinary high tide of said river.

Lots 1, 2, 3, 4, 5, and 6 of said block were the north tier of said block and each lay south of the said ordinary high-tide line of the Columbia river, and the center line of said Wall street in front of each of said lots also lay south of said ordinary high-tide line; also by said plat of Shiveley's addition aforesaid said block 126 was 300 feet east and west by one hundred and twenty-five feet north and

south and lay immediately north of said block 141 and was surrounded by said Salmon street on the east, Cedar street on the south, West First street on the west, and Cushing Court street on the north, and lay then and there entirely below ordinary high tide of said Columbia river.

Also by said plat of Shiveley's addition aforesaid said block 127 was of like size as block 126 and lay immediately north thereof, between said Salmon street and West First street, and north of said Cushing Court street, and by said plat the north line of said
13 block 127 and of said plat was bounded by a way shown upon said plat of thirty feet in width running up to lines marked for the waters of the said Columbia river, and beyond the north line of said block 127 and said way there was a distance of 800 feet to the ship channel of the Columbia river upon which no lots or block were by said plat laid out.

Third. That the line of ordinary low tide of the said Columbia river is and was, on the 15th day of December, 1890, and long prior thereto, at least 100 feet north of the north line of said block 127, and the tide land between said Salmon street and West First street from ordinary high tide to ordinary low tide was then and there equal to six acres, but on September 18, 1876, the line of ordinary low tide of said river was at the north line of block 141 and was so represented in the application of said plaintiffs to purchase said tide lands hereinafter set forth, and there was upon said block 141 nearly three acres of tide land and no more.

The said plats of the town of Astoria were by the deed of the State of Oregon to said plaintiffs and others for tide land expressly ratified and adopted.

Fourth. That on the second day of June, 1864, the said John M. Shively and his said wife laid out and caused to be recorded in the clerk's office of said county an addition to the said town of Astoria so laid out as aforesaid upon the said waters of the Columbia river north of said blocks 127 and 146 and covering all the space between the same and said deep ship channel and extending the said streets running north and south to the said ship channel and establishing in the place of said way a street sixty feet in width as
14 the boundary of the northern tiers of blocks of said town of Astoria as laid out and recorded on said 20th day of May, 1854.

And on the 20th day of October, 1876, the legislature of the State of Oregon by an act duly passed dedicated to the city of Astoria all of its title in the said streets running north and south to the ships channel of the Columbia river and all of the streets running east and west down to ordinary low tide of the Columbia river in the said town of Astoria so laid out and recorded by John M. Shively.

Fifth. That on the 18th day of February, 1860, said John M. Shively and his wife, Susan L. Shively, executed a deed to one James Welch for the said blocks 146, 126, and 127 by the description following and not otherwise, to wit: Blocks 126, 127, and 146, in the town plat of Astoria, as laid out and recorded by John M. Shively, and on the same day, by a similar description, conveyed

to said Nancy Welch said block 9 hereinbefore mentioned and described, and the plaintiffs herein have succeeded since the year 1865 to the said title of said James M. Welch and of said Nancy Welch to said blocks and have no other title thereto nor to the tide lands and riparian rights in controversy herein except such as they may have derived from the deeds of the board of school land commissioners of the State of Oregon hereinafter set forth and described.

Sixth. That on the 18th day of September, 1876, a deed was executed by the governor, secretary of state, and State treasurer of the State of Oregon, acting as board of school land commissioners, in favor of plaintiffs for all the tide land on the said block 146, and no deed has ever been executed to any one by the State of Oregon for any tide land north of said block 146.

15 Seventh. That on the 18th day of September, 1876, and prior, by application, according to the rules of the board of school land commissioners, filed March 31, 1876, the said plaintiffs being then and there the owners of the west half of said block 9 and not otherwise, applied to the said board of school land commissioners, under the act of 1874, to purchase the tide lands abutting and fronting upon said block 9, and in said application they set forth that only lot 6 of said block 9 abutted and fronted upon said Columbia river at ordinary high tide, and thereupon and in consideration of the sum of $10.00 per acre for less than three acres of tide land the said board executed in favor of said plaintiffs a deed for tide land in front of and abutting upon said block 9, described as follows: "That parcel being all the land lying between ordinary high tide and ordinary low tide both on and in front of block 9, in said Shively's Astoria, including all the tide — in block 141, in said Shively's Astoria." The said deed also embraced other property, and the full description therein is as follows: "All the land lying between ordinary high tide and ordinary low tide lying both on and in front of the east half of block 5, in the tract known as Shively's Astoria, and including the tide land on the east half of block 145, in said Shively's Astoria; also that parcel being all the land lying between ordinary high tide and ordinary low tide both on and in front of block 9, in said Shively's Astoria, including all the tide land in block 141, in said Shively's Astoria, containing in all 4.63 acres, more or less."

And these defendants allege that no title to any tide land was conveyed by the said deed, and particularly none on block 141, in the said Shively's addition to the town of Astoria, and the plaintiffs have no other or futher title to said tide lands on block

16 141 nor to the tide land north thereof to the line of ordinary low tide than as is herein set forth, and the said deed is a cloud upon the title of these defendants which they are entitled to have removed.

Eight. That on the — day of ——, 1884, John M. Shively, the predecessor in interest of the defendant Charles W. Shively, began a suit in this court against the said plaintiffs to recover said block 141, but he dismissed the same prior to the commencement of this suit without prejudice.

Ninth. That on the 15th day of December, 1890, the said John

M. Shively, then and there being the owner by mesne conveyances of whatever title in the premises was in his said wife on said 2nd day of June, 1864, conveyed by deed, duly executed, to the defendant Charles W. Shively, all his said right, title, and interest in said premises, and said defendant is now and was at the time of filing the dedication deeds described in the complaint of the plaintiffs the owner of all of said rights.

Tenth. That the said plaintiffs have been in the possession of said west half of block 141 and of said wharfage property lying at the said ship channel north of said block 127 for 6 years last past without the authority of these defendants or of their predecessors in interest, and that the reasonable value of the rents and profits of said property so unlawfully detained from the defendant C. W. Shively is as follows:

The west half of block 141, $100.00 per month from June 19, 1885, making a total value to date of $7,200.00; the wharfage property north of said block 127, $100.00 per month from June 19, 1885, $7,200.00; and defendant Charles W. Shively alleges that he has been damaged by said unlawful detention of his said property in the sum of $14,400.00.

17 Eleventh. The plaintiffs herein are setting up some unfounded claim to said riparian rights north of the west half of said block 146 and threaten to use the same for their own, and they claim in like manner to said west half of block 141 and to the riparian rights north of said block 127 to deep ship channel.

Wherefore these defendants, being remediless at law, demand a decree against said plaintiffs:

1. That defendant Charles W. Shively is the owner in fee simple of the south one-third of lots 7, 8, and 9 of block 141, in the town of Astoria, Oregon, as laid out and recorded by John M. Shively, and of all the riparian and wharfage rights and tide lands north and in front thereof to the deep ship channel of the Columbia river, except so much thereof as is embraced in block 126 and 127, in said town, and that he is the owner also of all the riparian and wharfage rights north and in front of block 4, in said town, to the deep ship channel, except those embraced in block 146, and that he do have and receive possession of said premises.

2. That he receive the sum of $14,400.00 from said plaintiffs as damages for unlawfully withholding said premises.

3. For such other or further relief as to the court shall seem meet and proper.

SIDNEY DELL,
Defendants' Attorney.

18 STATE OF OREGON, }
County of Clatsop, } ss:

I, Charles W. Shively, being first duly sworn, say that the foregoing answer is true as I verily believe, and that I am one of the defendants herein.

C. W. SHIVELY.

Sworn to and subscribed before me this June 19, 1891.

SIDNEY DELL,
Notary Public for Oregon.

STATE OF OREGON, } ss:
County of Clatsop, }

Due service of the within answer and counter-claim is hereby accepted in Clatsop county, Oregon, this 19th day of June, 1891, by receiving a copy thereof duly certified to as such by Sidney Dell, attorney for defendants.

J. Q. A. BOWLBY,
Attorney for Plaintiffs.

Endorsed; Filed June 19th, 1891. Answer and counter-claim. C. J. Trenchard, clerk, by J. P. Dickenson, deputy.

19 *Judgment.*

In the Circuit Court of the State of Oregon for the County of Clatsop.

Oct. 26th, 1891, 19th day Sept. term.

J. Q. A. BOWLBY and W. W. PARKER, Plaintiffs,
vs.
C. W. SHIVELY and ANNIE M. SHIVELY, Defendants.

Now, at this time, comes on to be considered the motion of plaintiffs for dismissal of this suit without prejudice to their interests therein heretofore made; and the court, having taken the same under advisement and being now well advised, allows the same.

Therefore it is ordered that this suit be dismissed without prejudice to plaintiffs.

FRANK J. TAYLOR, *Judge.*

Endorsed: Filed Dec. 21, 1891. Judgment. C. J. Trenchard, clerk, by J. P. Dickinson, deputy.

20 *Notice of Appeal.*

In the Circuit Court of the State of Oregon for the County of Clatsop.

J. Q. A. BOWLBY and W. W. PARKER, Plaintiffs,
vs.
CHARLES W. SHIVELY and ANNIE M. SHIVELY, Defendants.

To J. Q. A. Bowlby and W. W. Parker, plaintiffs, and to J. Q. A. Bowlby, attorney for plaintiffs above named:

You will please take notice that the defendant Charles W. Shively in the above-entitled suit hereby appeals to the supreme court of this State from the order of the said circuit court sustaining the demurrer of the plaintiffs to the answer of this defendant and decree dismissing said answer, made and entered in said court on October 10th,

1891, and from an order and decree in said suit dismissing plaintiffs' suit on plaintiffs' motion, and, notwithstanding this, defendants' counter-claim therein filed, made and entered in the said circuit court on the 26th day of October, A. D. 1891, in favor of the plaintiffs in said suit and against said defendant C. W. Shively and from the whole thereof and from all orders therein.

Dated this 24th day of February, A. D. 1892.

Yours, etc.,

SIDNEY DELL,
Attorney for Defendants.

Endorsed: Filed February 24, 1892. Notice of appeal. C. J. Trenchard, clerk.

21 *Undertaking on Appeal.*

In the Circuit Court of the State of Oregon for Clatsop County.

J. Q. A. BOWLBY and W. W. PARKER, Plaintiffs,
vs.
CHARLES W. SHIVELY and ANNIE M. SHIVELY, Defendants.

Whereas the defendant C. W. Shively in the above-entitled suit appeals to the supreme court of the State of Oregon from an order and decree made and entered against him in the said suit in the said circuit court in favor of the plaintiff- in the said suit, made on the 10th day of October, A. D. 1891, sustaining demurrer to defendants' answer and dismissing same, and from an order and decree made and entered in said suit in said court in favor of the plaintiffs and against the defendants therein on October 26th, 1881, dismissing plaintiffs' suit therein on plaintiffs' motion and notwithstanding defendants' counter-claim therein, and from all orders therein:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Charles W. Shively, as principal, and —— ——, as surety, both of the county of Clatsop, State of Oregon, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages, costs, and disbursements which may be awarded against him on the appeal.

C. W. SHIVELY,
By SIDNEY DELL. [L. S.]
E. R. HAWES. [L. S.]

22 STATE OF OREGON, *County of Clatsop,* } *ss:*

I, E. R. Hawes, whose name is subscribed to the within undertaking as surety, being duly sworn, say—

That I am a resident and freeholder within the State of Oregon and am not a counsellor or attorney at law, sheriff, clerk, or other officer of any court, and am worth the sum of two hundred dollars over and above all debts and liabilities and exclusive of property exempt from execution.

E. R. HAWES.

Subscribed and sworn to before me this 24th day of February, A. D. 1892.

[SEAL.] SIDNEY DELL,
Notary Public for Oregon.

Endorsed: Filed this 24th day of February 1892. Undertaking on appeal. C. J. Trenchard, clerk.

23 *Clerk's Certificate.*

STATE OF OREGON, } ss:
County of Clatsop, }

I, C. J. Trenchard, county clerk and clerk of the circuit court of the county of Clatsop and State of Oregon, do hereby certify that the foregoing copy of complaint, summons, demurrer by plaintiffs, answer and counter-claim, judgment, notice of appeal, undertaking on appeal, — certificate, constituting the judgment-roll in the case of J. Q. A. Bowlby and W. W. Parker, plaintiffs, *vs.* C. W. Shively and Annie M. Shively, defendants, has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such originals, papers, and judgment entries constituting the judgment-roll in said action as the same appears on file and of record at my office and in my custody.

In testimony whereof I have hereunto set my hand and fixed the seal of said court this 25th day of February, A. D. 1892.

[SEAL.] C. J. TRENCHARD, *Clerk.*

23½ (Endorsed on back as follows:)

In the circuit court of the State of Oregon for Clatsop county. J. Q. A. Bowlby and W. W. Parker, plaintiffs, *vs.* C. W. Shively and Annie M. Shively, defendants. Filed March 4, 1892. J. J. Murphy, clerk.

24 And I, the said clerk of the supreme court of the State of Oregon, do further certify that on the 18th day of June, 1892, the judgment of our said supreme court in said cause was entered of record and is as follows:

Judgment of Sup. Court of Oregon.

25 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court-room, in the city of Salem, on the first Monday, the 7th day, of March, 1892—present, Hon. Reuben S. Strahan, chief justice; Hon. William P. Lord, associate justice; Hon. Robert S. Bean, associate justice, and J. J. Murphy, clerk—the following proceedings were had on Saturday, the 18th day of June, 1892, the same being the 40th judicial day of said term:

J. Q. A. BOWLBY and W. W. PARKER, Respondents,
v.
C. W. SHIVELY (App.) and ANNIE M. SHIVELY, Defendants.
} Appeal from Clatsop County.

This cause having heretofore, to wit, on the 7th day of April, 1892, been argued and submitted by the attorneys of the respective parties above named and by the court then reserved for further consideration, and the court, having duly considered all the questions presented by the transcript and the arguments of the respective attorneys thereon, and being now fully advised in the premises, finds that there is not error as alleged.

It is therefore considered, ordered, and decreed that the decree in this cause in the court below rendered be, and the same hereby is, in all things affirmed.

And it appearing to the court that the respondents have acquired the title of the State in and to the tide lands in controversy and the rights and privileges attendant thereon of wharfage, etc., to the deep channel of the Columbia river in front thereof, and that the appellant's claim of title to said tide lands and the right of
26 wharfage, etc., to deep water is without merit, his answer constitutes no valid defense to respondents' complaint herein.

It is therefore further ordered and decreed that the demurrer to said answer be, and the same hereby is, sustained and said answer is dismissed; and the court, having fully considered respondents' motion to dismiss the suit without prejudice to their interests in the subject thereof, and being fully advised in relation thereto, finds that the respondents are entitled to such dismissal of their suit.

It is therefore further ordered that the suit be, and the same hereby is, dismissed without prejudice to the interests or rights of said respondents.

Further ordered that respondents recover of appellant and E. R. Hawes, his surety upon appeal, their costs and disbursements in this court upon said appeal, allowed and taxed at $64.25, and that the cause be remanded to the said court below, and that a decree be there entered and docketed in accordance herewith.

26½ I further certify that the opinion of the court filed in said cause and upon which the judgment of affirmance was entered was as follows:

27 *Opinion Sup. Court of Oregon. Filed June* 18, 1892.

JOHN Q. A. BOWLBY *et al.*
v.
CHARLES W. SHIVELEY *et al.*

Clatsop county. Frank J. Taylor, judge. Defendants' appeal affirmed.

28 This is a suit to quiet title. The plaintiffs allege in substance that they are the owners and in possession of all the

tide lands on the west half of block 141, on all of blocks 126 and 127 and north thereof, and on the west half of block 146 and north thereof, in the city of Astoria as laid out by John M. Shiveley, by virtue of deeds from the State of Oregon more than ten years prior to this suit; that the premises are within the corporate limits of the city of Astoria, and that all the wharfing privileges and appurtenances thereto are owned by the plaintiffs, and that they have erected and maintained a wharf in front of block 127, and that the same extends out into the Columbia river, and that the defendants, husband and wife, pretending to act under the provisions of the Astoria sea wall charter act, passed February, 1891, attempted by a written instrument filed and recorded by them to dedicate to the public streets adjacent to the premises of the plaintiffs, except adjacent to blocks 126 and 127; that said instrument is void and casts a cloud upon the title of plaintiffs, which they ask to have removed, and that the defendants be enjoined from setting up any title thereto. The defendant C. W. Shiveley answered, admitting plaintiffs' possession, but denying their title to the tide land on any of the blocks except as to the west half of block 146. The allegations in the counter-claim are in substance that John M. Shiveley and his wife in 1854 were the owners in fee of a donation land claim embracing a large portion of the present city of Astoria, and that by the patent issued to them in 1865 the said donation claim was bounded on the north by the Columbia river; that on the 20th day of May, 1854, the said
29 Shively and wife laid out and caused to be recorded a plat of the original town of Astoria, and also an addition thereto, known as "Shiveley's addition," in which was embraced all the property in controversy; that the land platted included not only the high land, but also the tide lands and a portion of the bed of the Columbia river, and that each of the blocks was bounded by a street sixty feet in width, with the exception of the north tier; that a portion of the said blocks in the north tier, including said block 127, were bounded by a way 30 feet in width, but that the remainder of the blocks in the north tier, including block 146, were bounded by a street sixty feet in width; that block 141 is partly above and partly below ordinary high tide, and that lying between block 141 and the main channel of the river are blocks 126 and 127; that north of block 127 is the thirty-foot way already mentioned, and that between said way and the ship's channel of the Columbia river there is a distance of some eight hundred feet upon which no lots or blocks were laid out upon the plat; that lying south of block 141 is block 9, which is alleged to be entirely upon the high land and is separated from block 141 by a street; that block 4 is par-ly above and partly below ordinary high tide, and that north of and between it and the main channel is block 146, and that between block 146 and the main channel is a street sixty feet in width. It is further alleged that in February, 1860, John M. Sh-veley and wife executed a deed to one James Welch for blocks 146, 126, and 127 as laid out and recorded on said plat, and that on the same day they conveyed to Nancy Welch block 9 by a similar description, and that by

various conveyances the plaintiffs have succeeded to the said title of the said James and Nancy Welch to the said blocks, but that the plaintiffs have no other or further right or title to the property in controversy other than such as they may have derived from the deeds of the board of school-land commissioners; that on the 18th day of September, 1876, the State of Oregon conveyed to the plaintiffs by deed all the tide land in block 146, but that no deed has ever been executed to any one by the State for any tide land north of said block 146, and that on the same day the State conveyed by deed to plaintiffs with the following description: "All the tide land lying between ordinary high tide and ordinary low tide, lying both on and in front of the east half of block 5, in the track known as Shiveley's Astoria, and including the tide land on the east half of block 145, in said Shiveley's Astoria; also that parcel being all the land lying between ordinary high tide and ordinary low tide, both on and in front of block 9, in said Shiveley's Astoria, including all the tide land in block 141, in said Shiveley's Astoria, containing 4.63 acres, more or less."

It is also alleged that John M. Shiveley, having acquired his wife's interest and never having conveyed away the bank lots abutting and fronting on blocks 141 and 146, nor any rights north of blocks 127 and 146 except as inferable from the above-described conveyances, did, on Dec. 15, 1890, convey to C. W. Shiveley all his rights in the property in controversy.

The defendants ask that they may be decreed to be the owners of all the riparian and wharfage rights on block 141 and in front thereof to the deep ship channel of the Columbia river, except so much thereof as is embraced in blocks 126 and 127, and that they may be decreed to be the owners of the riparian and wharfage rights north of and in front of block 4, in said town, to the said deep ship channel of the Columbia river, except in so far as those rights may be embraced in block 146. The plaintiffs demurred to the answer of the defendant C. W. Shiveley, setting up a counter-claim, which was sustained by the court below, etc.

LORD, *J.*:

The facts as stated above for the purposes of the case may be thus summarized: That John M. Shiveley, who was the owner of certain property on the Columbia river, platted and laid it out in blocks and lots, some of which extended below the line of ordinary high tide and some below the line of low tide, and that he sold to James Welch the blocks already described, lying below the ordinary high tide, with reference to such plat, and that the plaintiffs have succeeded to Welch's title to the same, and that since then the plaintiffs have acquired by deed from the State of Oregon all the tide lands on and in front of said blocks. Under the title and rights thus acquired by purchase from the grantees of John M. Shiveley and from the State, the plaintiffs have built and extended a wharf into the Columbia river, which the defendants claim is an invasion of their property rights. This claim is based on the assumption that an upland proprietor of land adjacent to tidal waters has certain

rights in such waters and the tide lands covered by them peculiar to that situation, which are not enjoyed in common with the people at large, and that among them is the right of access to the navigable water by means of wharves over such tide lands, usually called a right of wharfage, which may be made the subject of sale and reservation by such upland owner.
32 Hence it is argued that when John M. Shiveley sold and conveyed the blocks in question, with their appurtenances, with reference to the plat made by him, no mention having been made of such wharfage rights, that he did not part with them by force of such conveyances, but that they were impliedly reserved, and as a consequence that the wharf of the plaintiffs is an encroachment on his property rights. This assumption necessarily excludes the idea that the State may sell and convey its tide lands to a person not holding under the upland proprietor, so as to deprive such upland owner of his right of access to the navigable water by means of wharves and piers. On the other hand, the plaintiffs contend that the State may sell and convey its tide lands, and that its grantees take them free from any right therein of the upland owner and subject only to the paramount right of navigation inherent in the public. This proceeds upon the theory that the State is vested with the *jus privatum* and the *jus publicum* supposed to have been vested in the crown and parliament, in the navigable waters and the soil under them. The distinction between such rights has been thus stated by Earl, J.: "From the earliest times in England the law has vested the title to and the control over the navigable waters therein in the crown and parliament. A distinction was taken between the mere ownership of the soil under water and the control over it for public purposes. The ownership of the soil, analogous to the ownership of dry land, was regarded as *jus privatum* and was vested in the crown. But the right to use and control both the land and water was deemed a *jus publicum*, and was vested in parliament. The crown could convey the soil under water so as to give private rights therein, but the dominion and control over
33 the waters, in the interests of commerce and navigation, for the benefit of all the subjects of the kingdom, could be exercised only by parliament. In this country the State has succeeded to all the rights of both crown and parliament in the navigable waters and the soil under them, and here the *jus privatum* and the *jus publicum* are both vested in the State." Langdon *v.* Mayor, etc., of the City of N. Y., 93 N. Y., 155. Hence it is argued for the plaintiffs that a patent of the United States to a grant of land bounded by tidewater limits the land conveyed to high-water mark and gives the grantee no private or exclusive right whatever below that; that such a grant is exclusively a conveyance of dry land precisely as if it were bounded on all sides by dry land; that the State is the owner of the soil under water or the tide lands, and as such owner may sell and convey such tide lands, and that its grantees may use and improve them by the erection of wharves, docks, or buildings, subject only to the paramount right of navigation, and that as a consequence upon the facts the defendants have no private or ex-

clusive rights whatever below high-water mark or any property rights, wharfage, or otherwise in the premises. This conclusion, it is insisted, is in harmony with our own adjudication and is the only principle upon which they can be sustained, and that the profession and people have so understood and acted upon them when dealing with such lands, so that a decision now adverse to them would tend to greatly disturb titles.

It must be admitted if this is a proper exposition of the law or deduction from it, as adjudged by this court, no matter what might be our personal view, if the question were *res integra* it ought still to be adhered to.

Upon the admission of the State into the Union the tide lands became the property of the State and subject to its jurisdic-
34 tion and disposal. In pursuance of this power the State provided for the sale and disposal of its tide lands by the act of 1872 and the amendments of 1874 and 1876, session laws, 1872, p. 129; *id.*, 1874, p. 77; *id.*, 1876, p. 70. By virtue of these acts the owner or owners of any land abutting or fronting upon or bounded by the shore of the Pacific ocean or of any bay, harbor, or inlet of the same and rivers and their bays in which the tide ebbs and flows within the State were given the right to purchase all the tide lands belonging to the State in front of the lands so owned within a certain time and upon conditions prescribed, and providing further that in case such owner or owners did not apply for the purchase of such tide lands or, having applied, failed to prosecute the same as provided by law, that then such tide lands shall be open to purchase by any other person who is a resident and citizen of the State of Oregon, but in consideration of the fact that prior to 1872, as it would seem, these lands had been dealt with as private property and sometimes improved by expensive structures, the acts further provided in such cases that where the bank owners had actually sold the tide lands, then the purchaser of the tide land from the bank-owner or the previous bank-owner should have the right to purchase from the State. These statutes are based on the idea that the State is the owner of the tide lands and has the right to dispose of them; that there are no rights of upland ownership to interfere with this power to dispose of them and convey private interest therein except such as the State saw fit to give the adjacent owners and to acknowledge in them and their grantees when they had dealt with such tide lands as private property, subject, of course,
to the paramount right of navigation secured to the public.
35 These statutes have been largely acted upon and many titles acquired under them to tide lands. In the various questions relating to tide lands which have come before the judiciary the validity of these statutes has been recognized and taken for granted, though not directly passed upon. This will become manifest in the examination of the decisions of this court upon the State's ownership of the tide lands and the effect of its conveyances of the same. In Hinman *v.* Warren, 6 Or., 410, the land in dispute was tide land on the Columbia river and was embraced within the description of land patented to John McClure and wife by the United States. The

plaintiff claimed title to it by a chain of conveyances from the McClures and the defendant by deed from the State. "Upon these facts," McArthur, J., said, "two questions arise: 1. Do the tide lands belong to the State? 2. Did the patent of the United States invest in the McClures any estate in the land lying between the north line of their claim, as described in the patent, and the line which marks the ordinary high tide? In answer to the first question our response is that the tide lands—those that are uncovered and covered by the ebb and flow of the sea—belong to the State of Oregon by virtue of its sovereignty. This doctrine is the clear result of the principle announced in all the cases from Pollard's Lessees *v.* Hagan, 3 How., 230, to Barney *v.* Keokuk, 4 Otto, 324." * * * "As the State became the owner of the tide lands, it had the power under the provisions of the act providing for the sale of such lands—Miss.
36 Laws, p. 644—to sell the same. It has, however, no authority to dispose of its tide lands in such a manner as may interfere with the free and untram-eled navigation of its rivers, bays, inlets, and the like. The grantees of the State took the land subject to every easement growing out of the right of navigation inherent in the public. The second question finds its solution in the application of the familiar principle that 'a grant of land adjacent to a navigable river below the farthest point inland to which the neap tide flows extends only to the meander line of high tide.' It is of no consequence that calls of the McClure patent place the north line between high and low-water mark."

Upon the first question the court holds that the tide lands—the land in controversy being such—belong to the State by virtue of its sovereignty. Some contention is made that the phrase which describes the ownership of the State as being "by virtue of its sovereignty" indicates that the title held by the State to such lands is as trustee for the public, and not as absolute owner, capable of conveying private rights therein, subject only to the paramount right of navigation, but the use of this phrase in that case was not designed to convey that meaning when considered with reference to the whole decision. The contention was that the title of the tide lands before the admission of the State into the Union was in the United States and subject to its disposal, and as it had granted away by its patent the tide lands in question before the State was admitted no rights of the State ever attached to them. The court re-
37 fused to accede to this view, but, adopting the reasoning of Pollard's Lessees *v.* Hagan, *supra*, held that the State, upon its admission into the Union, became the owner of the tide lands, not as a grantee of the United States, but by virtue of its sovereignty, and that the State had the right to dispose of such tide lands under the provisions of the statutes referred to providing for their sale, and that its grantees took them subject only to the paramount right of navigation existing in favor of the public. The decision, therefore, is based on the idea that the State has a *jus privatum* in the tide lands distinguishable from the *jus publicum*, which it may sell so as to convey private interests therein; hence the phrase by virtue of its sovereignty was not intended to preclude any private use by the

State's grantee which did not interfere with the public rights. All this becomes more plain when the decision is considered with reference to the answer given by the court to the second question, namely, "that a grant of land adjacent to a navigable river below the farthest point inland to which the neap tide flows extends only to the meander lines of high tides."

This conclusion rendered the fact that the line of the McClure patent included the tide lands in controversy of no consequence or effect. His grant, being bounded by the Columbia river, or tide water, limits the land conveyed to the line of ordinary high tide, and consequently gave him no estate or exclusive rights below that. That this is the proper deduction to be drawn from the decision upon this point is made still more manifest by the language of Boise, J., in Parker *v.* Taylor, 7 Or., 446, 447 wherein he says: "As before stated, the patent from the United States conferred on the patentee no right to the tide lands lying between high and low water.

38 These were the property of the State and absolutely at its disposal. Its deed gives to them (the grantees of the State) the same fee-simple title (to the tide lands) as the patent from the United States gave to the land above high tide."

This language is based on the idea that the State has a *jus privatum* in the tide lands, and that its grantees take them free from any right or easement therein by the upland owner and subject only to the paramount right of navigation inherent in the public. It excludes the idea that the title of the State or its grantee to the tide land is subject to an easement or right of wharfage over the land as a natural right in the upland proprietor. It is impossible, as counsel say, that the tide land should be subject to this servitude if the grantee of the State takes "the same fee-simple title to the tide land as the patent gave to the land above high tide."

Moreover, in the same opinion, after stating that "the tide lands lying between high and low water mark belong to the State and can be sold by it and that the State has the power to provide for and regulate wharves, as it had done by act of the legislature," Boise, J., says: "Land situated as this is, covered with shoal water, may, under proper regulations, by the State and municipal authorities be reclaimed from the sea by filling in or by driving piles and building on them, and becomes private property and the subject of sale the same as any other property." This view that the State is the absolute owner of the tide lands, freed from any easement of the upland owner therein and subject only to the paramount right of navigation, is still further illustrated in the case of Parker *v.* Rodgers, 8 Or., 183. In that case the court was considering the question of wharf rights in connection with the right

39 of a person who has purchased tide lands of a riparian proprietor to a deed from the State to such tide land if he makes his application to purchase the same in the time allowed by statute, which necessarily involved the consideration of the act of 1872 and the act of 1874 amendatory thereof, *supra*, and their purpose and effect, and Boise, J., said: "Though the State was under no legal

obligation to recognize the rights of either the riparian owner or those who had occupied these tide lands, still the legislature, considering the facts that these lands had been dealt with as private property and improved sometimes by the erection of expensive structures, which were of a great advantage to commerce, made what we think wise and just provisions for the protection of those who had spent their money in purchasing and improving these lands."

While every one must, as the court say-, regard these acts of the legislature as wise and just under the circumstances, yet to avoid misapprehension the court is just as particular to say that the State was under "no legal obligation to recognize such rights," and as a consequence if the State had not done so neither the upland owners for the purchasers from them would have had any rights whatever in the tide lands.

In effect it seems to us, in view of previous adjudications, as equivalent to saying that an upland owner on tidal waters has no rights as against the State or its grantees to extend wharves in front of his land or to any private or exclusive rights whatever in the tide lands except as he has derived them from the statute. It is true the legislature of this State had made provision by which the upland owner within the corporate limits of any incorporated town might build wharves prior to the acts of 1872 and 1874, *supra*,
40 but within the purview of our adjudications it would, as a matter of power, have been equally competent to have given this privilege to others. (Sec. 4227, Hill's Code.) But this act is not a grant. It simply authorizes upland owners on navigable rivers within the corporate limits of any incorporated town to construct wharves in front of their land. It does not vest any right until exercised. It is a license, revocable at the pleasure of the legislature until acted upon or availed of. (Eisenbach *vs.* Halfield, 2 Wash., 250.) Shively did not avail himself of the license, nor is there any pretense to that effect. The plaintiffs have built a wharf upon and in front of their tide land. If the act is as applicable to tide lands as upland on navigable waters they have exercised the right. The language of the act is, "the owner of any land lying upon any navigable stream or other like water," which would seem to apply to the owner of tide land; but, however, this may be, the act has already received a construction from this court. In Parker *vs.* Rodgers, *supra*, after quoting this language of the act, Boise, J., said in speaking for the court: "We are aware that it is a general rule that what is appurtenant to land passes with it, being an incorporeal hereditament, but the right to build a wharf on the land of the State below high water is a franchise which attaches to the tide land, and is appurtenant to it rather than to the adjacent land, for it can be severed from the adjacent land and enjoyed without it." This is predicated upon the idea that without the act an upland owner would have no right to build a wharf over the land of the State or tide lands, because the right or franchise attaches to the tide land, and is appurtenant to it and not to the adjacent land. The grantor of the defendants did not
41 avail himself of the license under the act, but the plaintiffs, as owners of the tide lands, have built a wharf, and in

view of our adjudications it is difficult to understand from what other source the right claimed by the defendants is to be derived. In the cases decided by this court, which have succeeded those mentioned, no other or different opinion in respect to the ownership of the tide land has been expressed by the court or by any judge authorized to speak for it. In Wilson *vs.* Welch, 12 Or., 353, Thayer, J., undertook to express his own and a different view not necessary to the decision of the case, and the other members of the court expressly refused to concur except in the result. In McCann *vs.* Oregon R. Co., 13 Or., 462, the same judge, recognizing that his opinions upon that subject would not meet with the concurrence of his associates, especially in consideration of the fact that his particular view was not necessary to the decision of the case, said: "I have for some time maintained a different view from that of my associates upon the bench, and also from that expressed in the opinion of some of our predecessors in adjudged cases regarding the nature of the State's title to lands between high and low water mark. * * * My opinion upon the subject was expressed in Wilson *vs.* Welch, 12 Or., 353. * * * I still adhere to that opinion. * * * But waiving that view of the question and conceding that the State is, as some of the authorities have said, the owner in fee of the lands referred to, and can grant them with the incidental rights of the shore or bank owner to any private person the State government may please to favor, and still I do not see how the appellant can be entitled to the relief claimed under the provisions of said chapter 63 of the laws of
42 the State." As this quotation explains the situation, it is hardly necessary to make any comment other than to say that the "different view" his associates maintained, so far as I was concerned, was that "the opinion of our predecessors in the adjudged cases" should be regarded as settled law, which could not be disregarded without disturbing titles and bringing disaster, perhaps, upon those who had accepted and acted upon those decisions as the law of the State.

In Parker *vs.* Packing Co., 17 Or., 510, the only question in the case was whether ejectment would lie to recover a wharfage right, and the court was agreed that it would not. In the preparation of his opinion, however, Thayer, J., expressed, as usual, his "different view," but without the concurrence of his associates, which, by some oversight, is not noted in the case. As these expressions of his personal views are so purely obiter, especially in view of the preceding cases, the non-concurrence of his associates in them was hardly necessary to avoid misapprehension. It has been deemed necessary to review "the opinions of some of our predecessors in adjudged cases regarding the nature of the State's title to lands between high and low water mark" for the purpose of showing that these decisions are the foundation of the doctrine in this State; that the State may sell and convey its own tide lands, and that its grantees take them free from any right therein by the upland owner and subject only to the paramount right of navigation inherent in the public; that this doctrine of the nature of the State's title to tide lands was so understood to have been adjudged in those cases by Thayer, J., and

his associates, and was the producing cause of his "different view;" that Judge Thayer himself never understood or claimed that he
43 was speaking for the court in the expression of such views, and that the non-concurrence of his associates in them in the first instance was noted to avoid misapprehension and for the reason that the "adjudged cases" had become the foundation of many titles and the law of the State and ought not to be disturbed, considerations which my present associates think ought still to govern us and to be adhered to, leaving out of view the stronger reason that "the opinions of our predecessors in the adjudged cases" are the better and more correct exposition of the law of the nature of the State's title to the tide lands. Nor is this doctrine peculiar to this State. In our neighbor State of Washington the right of the State to dispose of its tide land free from any easement of the upland onwer is maintained in a well-considered opinion in Eisenbach *vs.* Hatfield, 2 Wash., 353. That State, like our own, is largely affected by this question, and it is desirable that the rule of decision in the two States should be uniform. It certainly would be unfortunate if different rules should be established for either side of the Columbia river. The cases usually regarded as leading in support of this doctrine are Stevens *vs.* Paterson, etc., Railroad Co., 34 N. J. L., 533, and Gould *vs.* Hudson R. R. Co., 6 N. Y., 522. In the former of these Beasely, C. J., said "that lands under water, including the shore of tide water in New Jersey, belong absolutely to the State, which has the power to grant them to any one free from any right of the riparian owner in them." This language, and the uses to which the tide land was put, not being in aid of navigation, flouts the idea that the right of disposal as against the upland owner was intended to be limited in its application to public uses. In the latter of these cases, Gould *vs.* Hudson
44 R. R. Co., *supra*, it was held by the court of appeals that an owner of upland along high-water line on the Hudson river has no exclusive riparian rights below that line, and hence sustained no legal damage from a railroad embankment built under a grant from the State which cut off his access to the river. This decision is a rule of property in that State, and has never been questioned. Other cases in which the same doctrine has been held are Penn. R. R. Co. *vs.* N. Y. R. R. Co., 23 N. J. Eq., 157; Sugar Refinery Co. *vs.* Jersey City, 26 N. J. Eq., 274; Matter of Water Commissioners, 3 Ed., ch. 290; Getty *vs.* Hudson R. R. Co., 21 Barb., 617; Tomlin *vs.* Railroad Co., 32 Iowa, 106; Canal Com. *vs.* People, 5 Wend., 423; People *vs.* Canal Appraisers, 33 N. Y., 461; Monongahela Nav. Co. *vs.* Coons, 6 W. & S., 101; McKean *vs.* Del. Canal Co., 49 Pa. St., 424.

Nor does the Supreme Court of the United States assert any doctrine to the contrary. It recognizes the fact that the rights of the upland owner are matters of legislation and usage in the several States, and applies the law of the State accordingly. This is illustrated in the case of Hoboken *vs.* Penn. R. R. Co., 124 U. S., 656, in which Mr. Justice Mat-hews states and applies the law of New Jersey as adjudged in Stevens *vs.* Paterson, *supra*. In the absence of legislation or usage in the several States they declare that the common-law rule would govern the rights of the riparian proprietor, and that

by that law the title to the tide lands is in the State. In Weber *vs.* State Harbor Commissioners, 18 Wallace, 65, Mr. Justice Fields, after stating that it was not necessary to controvert the doctrine of Yates *vs.* Milwaukee, 10 Wall., 497, for reasons quite apparent, proceeds to say: "Nor is it necessary to controvert the proposition that in several of the States, by general legislation and
45 immemorial usage, the proprietor whose land is bounded by the shore of the sea or of an arm of the sea possesses a similar right to erect a wharf or pier in front of his land extending into the water to the point where they are navigable. In the absence of such legislation or usage, however, the common law would govern the rights of the proprietor, at least in those States where the common law obtains. By that law the title to the shore of the sea and of the arms of the sea and in the soils under tide water is, in England, in the king's, and in this country, in the State. * * * Upon the admission of California in the Union upon equal footing with the original States absolute property in and dominion and sovereignty over all soils under the tide waters within her limits passed to the State with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General Government."

In Harden *vs.* Jordan, 140 U. S., 371, Mr. Justice Bradley said: "With regard to grants of the Government for lands bordering on tide water it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the State within which they are situated, if a State has been organized and established there. Such title to shores and land under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto and held in trust for the public purposes
46 of navigation and fishery—and cannot be retained or granted out to individuals by the United States. Pollard *vs.* Hagan, 3 How., 212; Goodtitle *vs.* Kibbe, 9 How., 471; Weber *vs.* Commissioners, 18 Wall., 57.

Such title being in the State, the lands are subject to State regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them and granting fisheries in particular localities; also by reclamation of submerged flats and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities and are put to other public or private uses—State control and ownership therein being supreme—subject only to the paramount authority of Congress in making regulations of commerce and in subjecting the lands to the necessities and uses of commerce (see Manchester *vs.* Mass., 139 U. S., 240; Smith *vs.* Maryland, 18 How., 71; McCready *vs.* Virginia, 94 U. S., 391; Mar-

tin *vs.* Waddell, 16 Pet., 367; Den *vs.* Jersey Co., 15 How., 426). This right of the States to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also in some of the States to navigable rivers, as the Mississippi, the Missouri, the Ohio, and in Pennsylvania to all permanent rivers in the State; but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised.

47 In the case of Barney *vs.* Keokuk, 94 U. S., 324, we held that it is for the several States themselves to determine this question, and if they choose to resign to the riparian proprietors rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."

From all this it appears that when the State of Oregon was admitted into the Union the tide lands became its property and subject to its jurisdiction and disposal; that in the absence of legislation or usage the common-law rule would govern the rights of the upland proprietor, and by that law the title to them is in the State; that the State has the right to dispose of them in such manner as she might deem proper, as is frequently done in various ways, and whereby sometimes large areas are reclaimed and occupied by cities and are put to public and private uses, State control and ownership therein being supreme, subject only to the paramount right of navigation and commerce. The whole question is for the State to determine for itself; it can say to what extent it will preserve its rights of ownership in them or confer them on others. Our State has done that by the legislation already referred to, and our courts have declared its absolute property in and dominion over the tide lands and its right to dispose of its title in such manner as it might deem best, unaffected by any "legal obligation to recognize the right of either the riparian owners or those who had occupied such tide lands" other than it chose to resign to them, subject only to the paramount right of navigation and the uses of commerce. From these considerations it results, if we are to be bound by the previous adjudications of this court which have become a rule of property, and upon the faith of which important rights and

48 titles have become vested and large expenditures have been made and incurred, that the defendants have no rights or interests in the land in question. Upon this point there is no diversity of judgment among us. We all think that the law as adjudicated ought not to be disturbed, independent of other reasons and authorities suggested in its support. Speaking only for myself, I own that if the question in respect to riparian ownership was *res integra*, that I am inclined to the opinion that the owner of the upland on tide water has certain rights, arising from his adjacency to such waters, subordinate, however, to their use by the public for navigation and fishing, which are not enjoyed in common with the public. But for the reasons suggested I have felt bound to adhere to the law as adjudged by our predecessors. It is, therefore, the unanimous opin-

ion of this court that there was no error, and that the judgment must be affirmed.

49–51 I further certify that thereafter and on the 19th day of July, 1892, the plaintiff in error filed with me his assignment of errors upon said writ; which said assignment together with the undertaking on behalf of the plaintiff in error in said assignment and the order of approval thereon endorsed are as follows:

52 The Supreme Court of the United States.

CHARLES W. SHIVELY, Plaintiff in Error,
v.
JOHN Q. A. BOWLBY and W. W. PARKER, Defendants in Error. } Case No. —.

Writ of error to the supreme court of the State of Oregon in the suit of J. Q. A. Bowlby and W. W. Parker, respondents, *v.* Charles W. Shively, appellant.

Assignment of Errors.

Now comes Charles W. Shively, plaintiff in error, by Sidney Dell, his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

First. The supreme court of Oregon decided that a grantee of the United States under the act of Congress of September 27, 1850, known as the Oregon donation land law, of land bounded by the tidal navigable waters of the Columbia river, obtained by virtue of said grant no exclusive right of access to the channel of said river and no wharfage rights below ordinary high tide of said river in front of said high land, and thereupon affirmed the decree of the circuit court of the State of Oregon for Clatsop county, sustaining the demurrer to the answer of plaintiff in error, setting up said rights in his counter-claim, and dismissing said counter-claim and said suit of said defendants in error upon their motion.

53 Second. The supreme court of Oregon decided that said State was the absolute owner of all rights in front of the high land granted by the United States to said grantee, with said Columbia river as a boundary, below the meander line, out to the channel of said Columbia river, to the exclusion of all rights of the grantee aforesaid of the United States, under the said act of Congress of September 27th, 1850, and thereupon affirmed the decree of the circuit court of the State of Oregon for Clatsop county denying to plaintiff in error his rights claimed under said grant.

Third. The supreme court of Oregon decided that said State had the absolute power to dispose of the soil of said river and of all wharfage rights in front of the high land granted by the United States to said grantee, the predecessor of plaintiff in error, with said Columbia river as a boundary, to a private person for a private beneficial use and had so disposed of the same to the defendants in error, and thereupon affirmed the decree of the circuit court of the

State of Oregon for Clatsop county, denying the said claim of plaintiff in error, and decreeing that said defendants in error were then and there the owners of the wharfage rights in controversy in front of the donation land claim of John M. Shively, by a title from the State of Oregon paramount to the grant of the United States to said John M. Shively.

Wherefore the said Charles W. Shively prays that the decree of the said supreme court of the State of Oregon be reversed and the said supreme court of the State of Oregon be ordered to enter a decree in said court reversing the decree of the circuit court of the State of Oregon for Clatsop county.

SIDNEY DELL,
Sidney Dell,
Attorney for Plaintiff in Error.

54 Endorsed on back as follows:

Assignment of errors. Filed in office July 19, 1892. J. J. Murphy, clerk of supreme court of Oregon. Sidney Dell.

55 *Undertaking on Appeal.*

Know all men by these presents that we, Charles W. Shively, as principal, and Patrick O'Hara, as surety, are held and firmly bound unto John Q. A. Bowlby and W. W. Parker in the full and just sum of two hundred and fifty dollars, to be paid to the said John Q. A. Bowlby and W. W. Parker, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally and — by these presents.

Sealed with our seals and dated this 18th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a regular term of the supreme court of the State of Oregon, in a suit depending in said court between John Q. A. Bowlby and W. W. Parker, respondents, *vs.* Charles W. Shively, appellant, a decree was rendered against the said Charles W. Shively, and the said Charles W. Shively, appellant, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said John Q. A. Bowlby and W. W. Parker, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within 60 days from the date thereof:

Now, the condition of the above obligation is such that if the said Charles W. Shively shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

C. W. SHIVELY. [SEAL.]
PATRICK O'HARRA. [SEAL.]

Sealed & delivered in presence of—
EMIL T. SCHUMAN.
SIDNEY DELL.

Approved by—

WM. P. LORD,
Chief Justice Supreme Court of Oregon.

56 STATE OF OREGON, } ss:
Clatsop County, }

I, Patrick O'Harra, being first duly sworn, say that I am a resident and freeholder of said county and State, and that I am worth the sum of five hundred dollars over and above all debts and liabilities and property exempt from execution.

PATRICK O'HARA.

Sworn to and subscribed before me this July 18, 1892.
[SEAL.]
SIDNEY DELL,
Notary Public for Oregon.

56½ [Endorsed:] In the supreme court, State of Oregon. J. Q. A. Bowlby and W. W. Parker, respondents, *vs.* C. W. Shively, appellant. Undertaking on writ of error from Supreme Court of the U. S. Filed July 23, 1892. J. J. Murphy, clerk.

57 I further certify that on the 19th day of July, 1892, there was lodged with me a writ of error in said cause, which said writ is hereto and to this transcript attached, and that thereafter and on the 27th day of July, 1892, there was filed with me a citation issued in said cause, together with the certificate of service thereof, and the same is hereto attached and now herewith returned with this transcript.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Oregon this 5th day of August, 1892.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

58 UNITED STATES OF AMERICA, ss:

[Seal United States Circuit Court, Oregon.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Oregon, Greeting:

[Seal Supreme Court, State of Oregon.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Oregon, before you or some of you, being the highest court of law or equity of the said State in which a decision could by had in the said suit between John Q. A. Bowlby and W. W. Parker, respond-

ents, and Charles W. Shively, appellant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause
59 of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Charles W. Shively, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 16th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,
By R. B. LAMSON,
Deputy Clerk.

Allowed by—
WM. P. LORD,
Chief Justice Supreme Court of Oregon.

[Endorsed:] Filed July 19, 1892. J. J. Murphy, clerk.

60 UNITED STATES OF AMERICA, *ss:*

To John Q. A. Bowlby and W. W. Parker, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Oregon, wherein Charles W. Shively is plaintiff in error and you are defendants in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should

not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Wm. P. Lord, chief justice of the supreme court of the State of Oregon, this 23d day of July, in the year of our Lord one thousand eight hundred and ninety-two.

WM. P. LORD,
Chief Justice Supreme Court of Or.

[Endorsed:] Supreme Court United States, October term, 1892. C. W. Shively, plaintiff in error, *vs.* J. Q. A. Bowlby and W. W. Parker, def'ts in error. Citation. Filed July 27th, 1892. J. J. Murphy, clerk. Sidney Dell.

STATE OF OREGON, } ss:
Clatsop County, }

Due and legal service of the within citation is hereby admitted to have been made upon me, at Astoria, Oregon, this 25th day of July, 1892.

——— ———,
Def'ts in Error.

61 On this 25th day of July, in the year of our Lord one thousand eight hundred and ninety-two, personally appeared before me the subscriber, Sidney Dell, and makes oath that he delivered a true copy of the within citation to John Q. A. Bowlby and W. W. Parker each in person, at Astoria, Clatsop county, Oregon, at 4 o'clock afternoon of this July 25th, 1892.

SIDNEY DELL.

Sworn to and subscribed the 25th day of July, A. D. 1892.

[Seal George Noland, Notary Public, Oregon.]

GEO. NOLAND,
Notary Public for Oregon.

[Endorsed:] No. —. In the supreme court of the State of Oregon, March term, 1892. J. Q. A. Bowlby *et al.*, res., *vs.* C. W. Shively *et al.*, app's. Filed ——— —, 189–. ——— ———, clerk.

Endorsed on cover: Case No. 15,102. Oregon supreme court. Term No., 1132. Charles W. Shively, plaintiff in error, *vs.* John Q. A. Bowlby and W. W. Parker. Filed August 15th, 1892.

FILED.
OCT 18 1892
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1892.

No. 1132.

CHARLES W. SHIVELY, PLAINTIFF IN ERROR,

vs.

JOHN Q. A. BOWLBY AND W. W. PARKER, DEFENDANTS IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF OF PLAINTIFF IN ERROR.

A. H. GARLAND,
JOHN F. DILLON,
SIDNEY DELL,
For Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1892.

No. 1132.

CHARLES W. SHIVELY, PLAINTIFF IN ERROR,

vs.

JOHN Q. A. BOWLBY AND W. W. PARKER, DEFENDANTS IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

This was a suit in equity begun in the circuit court of the State of Oregon for Clatsop county by the defendants in error, who were in possession, against the plaintiff in error to quiet their title to and remove a cloud from certain tide land and wharfage rights claimed to be appurtenant thereto on the Columbia river near its mouth, in the city of Astoria.

They based their title solely upon a State patent to them for the tide land.

The defendant (plaintiff in error) answered the complaint, and in addition thereto sought affirmative relief by way of

cross-bill, known under the Oregon Code practice as a counter-claim, in which he set up his title as bank owner, having his wharfage right out to the navigable waters, as paramount to the patent of the State, and asked for a decree for possession and for the rental value of the property detained and to establish his title to the riparian right.

The plaintiffs (defendants in error) demurred to the counter-claim of defendant. The court sustained the demurrer and dismissed the counter-claim (Record, p. 10). The plaintiffs (defendants in error) thereupon asked for a nonsuit, which was granted (Record, p. 10), and the defendant (plaintiff in error) appealed to the supreme court of Oregon (Record, p. 11). Upon that appeal the supreme court affirmed the decree of the circuit court (Record, p. 13) upon the ground that the bank owner had no riparian rights in tidal navigable waters and the patent of the State to plaintiff for the tide land in front of the high land of the defendant (plaintiff in error) passed the absolute title to all rights below ordinary high-tide line out to the navigable waters. The court delivered its opinion accordingly (Record, pp. 13–25).

Statement of the Pleadings.

THE COMPLAINT alleged plaintiffs were the owners and in possession of all the tide lands on the west half of block 141, on all of blocks 126 and 127 and north thereof, and on the west half of block 146 and north thereof, in the city of Astoria, as laid out by John M. Shively, by virtue of deeds from the State of Oregon, and that they own all the wharfage rights in front of that tide land out to the ship channel of the Columbia river; that defendant, claiming to own these wharfage rights, had filed a dedication of a railroad avenue under the Astoria Sea Wall Charter act, passed February,

1891. They asked to have their title quieted. (Record, pp. 1 to 3.)

THE ANSWER admitted plaintiffs' possession but denied their title to the tide land on any of the blocks except the west half of block 146.

THE COUNTER-CLAIM sets up that John M. Shively, the immediate predecessor of defendant (plaintiff in error), was in the year 1854, under the act of Congress of September 27, 1850, commonly known as the Oregon donation land law, the owner in fee simple of his donation land claim, bounded on the north by the Columbia river; that, being the owner of the riparian and wharfage rights north of said land claim out to deep ship channel of that river, and having as such owner previously laid out and platted the town of Astoria upon said land claim down to ordinary high tide, and (by a first addition) thence below ordinary high tide and below ordinary low tide upon the unnavigable tide flats, but not to the said channel, he conveyed to one James Welch, according to said plat, fully described in the counter-claim, all of block 146, lying partly above and partly below low tide, but entirely below high tide; also all of blocks 126 and 127 which lay below low tide and north of block 141; also all of block 9 to Nancy Welch on the same day. Block 4 was the bank block south of block 146, and the south part of block 141 was the bank block south of said blocks 126 and 127. That all of said blocks were bounded by streets, according to said plats. Block 127 was bounded on the north, according to said plat, by a way of 30 feet in width running up to the lines marked for the waters of the Columbia river, and beyond the north line of that block there was 800 feet of unnavigable tide flats, on which no lots were by said first-addition plat laid out; but in 1864 he did lay out a second addition to said town upon said flats out to the channel, north

of blocks 127 and 146, extending the streets to deep ship channel and changing the 30-foot way to a 60-foot street called Water street. John M. Shively, having made no conveyance of said abutting bank blocks south of blocks 141 and 146 nor any conveyance of any rights north of blocks 127 and 146, except as inferable from the conveyances above named, according to the plats, did, on December 15, 1890, convey to defendant (plaintiff in error) all of his rights in the premises.

The counter-claim further sets up that on September 18, 1876, the State of Oregon executed to plaintiffs (defendants in error), as assignees of John M. Shively, a patent for the tide land on the west half of block 146; also on the same day a patent for "that parcel, being all the land lying between ordinary high and ordinary low tide, both on and in front of block 9, in said Shively's Astoria, including all the tide land in block 141, in said Shively's Astoria, containing in all," &c. The patent did not really convey block 141, but that is not reviewable on writ of error.

This tide land was for the nominal sum of $10, but under the State patent the wharfage right out to the channel, worth $100,000, is claimed.

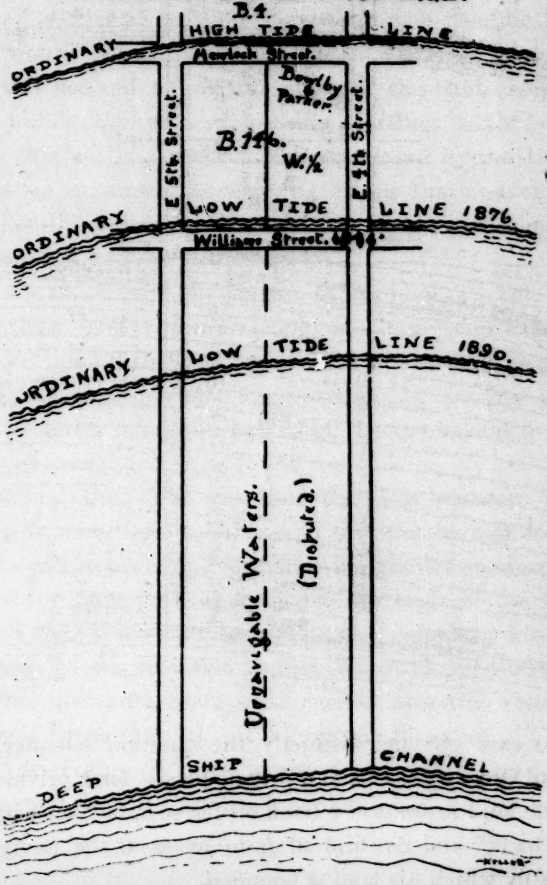
The plaintiffs (defendants in error) succeeded prior to September 18, 1876, to all the said title of James and Nancy Welch and have no other or further right or title to the premises in controversy than as herein set forth. The value of the rents and profits is set out and the right of defendant (plaintiff in error) to the possession of the premises. The prayer is for possession and damages for detention and a decree quieting his title and for general relief. (Record, pp. 5 to 9.)

The court sustained plaintiffs' demurrer to the counter-claim and ordered it dismissed (Record, p. 10). Whereupon

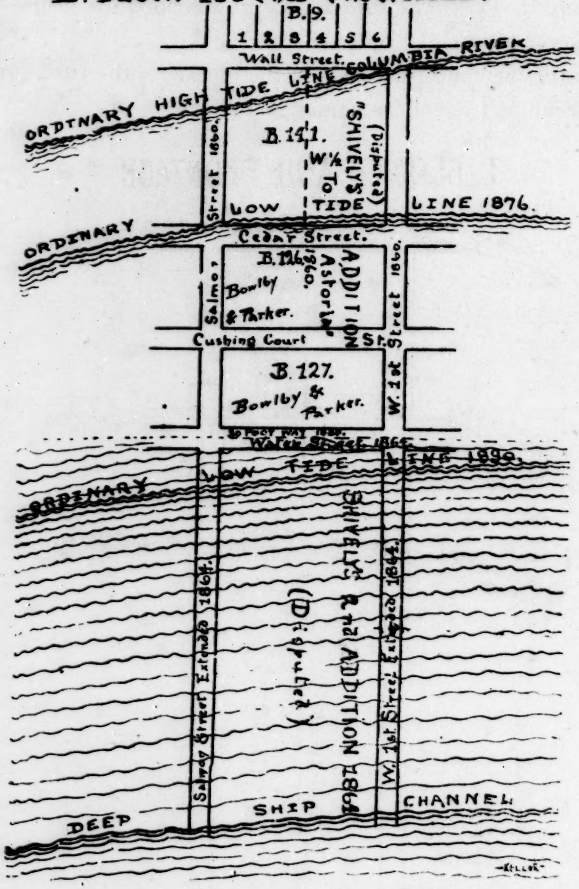
plaintiffs dismissed their own suit, and Shively appealed (Record, p. 11). The supreme court affirmed the decree of the lower court.

For convenience, the plats of the blocks on the banks and the frontage thereof are named as follows:

I. BLOCK 4 AND FRONTAGE.



II. BLOCK 141 AND FRONTAGE.



This case presents distinctly the question whether the State of Oregon can sell to a private person for a private use the tide land in front of a bank owner, so as to "fence up his water bank" and cut him off from access to the navigable waters by which his land is bounded.

It does not present a case of taking the flats for enlarging the channel as a public highway, nor yet the case of authorizing a public use of the tide flats as a highway.

In fact this case is the first instance in American law (except the Gould-Hudson R. R. case, now overruled, and the Eisenbach-Hatfield case, now in the crucible) where a court has held that the State, holding the bed of a public navigable river in trust for the public as a "public highway," could sell its tide-flat margin to a private person for a private use and cut off the access of the bank owner to that public highway. Especially startling is the claim when this act is done to a pioneer invited by the United States "to encounter the many hardships that unavoidably attended the emigration to the New World and to people the banks of its bays and rivers."

Taney, C. J., says, in Martin *vs.* Waddell, 16 Pet., 367, those (New Jersey) pioneers could not have been expected to do all this "if the land under the water at their very feet was liable to immediate appropriation by another party and the settler upon the best land thereby excluded from its enjoyment."

Although the bank owner had the State statutory right of wharfage and sold the tide land and flat by reference to his plat of the town, and although his grantee obtained the title of the State for $1 per lot on the basis of the bank owner's deed to him and by a State deed adopting his plat, by which he was only sold the lot described, yet the court held his quitclaim State deed carried also the wharfage right out to the channel. It is cause for blushing.

Let us inquire if there is any sound law or reason to justify such doctrines and such a claim.

SPECIFICATION OF ERRORS.

The errors relied upon by plaintiff in error are (1) the decree sustaining the demurrer of plaintiffs below to the counter-claim of defendant, and (2) the decree allowing plaintiffs' motion for a nonsuit notwithstanding the counter-claim of defendant, which, if it set forth a cause of suit, would render the allowance of plaintiffs' motion for a nonsuit erroneous.

Hence the question involved is whether the counter-claim showed a title by the bank owner to an easement or exclusive right of access over the unnavigable waters of the Columbia river under his patent from the United States granting him the high land *with that river as a boundary.* The supreme court of Oregon held the United States patent did not and could not grant any rights of easement below ordinary high tide, but that the *State patent* passed the absolute title to its grantee, for his *private beneficial use*, of all wharfage and other rights out to the navigable waters.

It is upon this error of the court denying a right claimed by plaintiff in error under the act of Congress of September 27, 1850, commonly known as the Oregon donation land law, plaintiff in error relies, and, as incident thereto, the denial by the court below of any reservation being made by the sale of the lots by plat.

NOTE.—Whether the State (after the United States has, by act of 1890, assumed jurisdiction) may for public purposes, as indicated in Yates *vs.* Milwaukee, reduce this boundary by making the river navigable up to the high bank, or whether that is the exclusive prerogative of the United States is not herein involved.

DOCTRINE OF THE BRIEF.

I. The United States has power to grant to the high-bank owner the wharfage right in Western navigable waters (though not in the original thirteen States):

(*a.*) Because its title to the high lands as well as the beds of those rivers is, by right of discovery and occupation, the original paramount sovereign title, unfettered, as to the "property" right, by any constitutional limitation on its sale.

(See in Brief the "Three Great Cases.")

(*b.*) Unfettered also as to the wharfage right, even if regarded as trustee of the soils of those rivers for the unborn State, coincidentally with its trust of the high lands for all of the States of the Union.

(See "A Distinction Noted" in Brief.)

(*c.*) Because, conceding even that it held the beds of those rivers in original constitutional trust at time of acquisition, for the sovereign State, still under the commerce and navigation grants of the United States Constitution it held, *at the same time*, a right to those waters for all purposes of commerce and navigation as National Highways, and had always the right to declare them, and did declare them in 1796 "public highways," and as the owner simultaneously of that highway *for such purposes*, and also of the adjacent high land, it thus had the right to grant this exclusive access.

(See "Road Boundaries" in brief.)

II. It *intended* by its "river boundary" to grant that exclusive easement.

III. It has the exclusive right to construe its own grants.

Argument.

The United States is the original absolute owner of all the "proprietary title" to the high land, all the beds and waters of the navigable rivers, tidal and non-tidal, and to all the fish therein in all the territory west of the Mississippi, the title to the same being acquired by the United States by discovery and occupation. (See Blaine's Twenty Years in Congress, vol. 1, p. 8.)

By "proprietary title" is meant only that which is held as a property right and is salable, and not that which is sovereign or governmental, such as eminent domain or other like right affecting the inalienable sovereignty of a State.

The United States, upon the acquisition of the title to that territory (including Oregon and Washington), had then the absolute right to sell or otherwise dispose of or burden these proprietary rights, because there was no limitation in the United States Constitution upon its absolute power. This power to sell was not confined to the "proprietary title" in the high lands, but embraced the tide land and beds of navigable waters, tidal or non-tidal, and, a fortiori, the lesser right (and most vital right to the value of the bank or adjacent highland) of an easement to the bank owner out to the navigable waters.

That there is no limitation in the Federal Constitution upon this power of sale is patent from a consideration both of the terms of the constitutional authority to acquire the territory by occupation and discovery, and also of the character of the Federal union of States.

Not any limitation under sec. 3, art. IV, U. S. Constitution, whether the power to dispose of these "proprietary rights" in territory acquired by *discovery and occupation* be derived from the second clause thereof—"power to dispose of and make all needful rules and regulations respecting the territory belonging to the United States," which is denied in the case of Dred Scott *vs.* Sandford, 19 How., 393, as applying only to the northwest territory, the title to which was obtained under the deeds of cession; for from the unlimited power (declared by the same decision) of the Congress under the first clause of that section to admit new States, and hence to acquire and sell all proprietary rights in the new territory necessary to be acquired and populated before they could be admitted.

Nor yet any limitation in the Federal character of the Union under the Constitution, for there can be no well-founded pretense that the Federal Government must, by force of the United States Constitution, hold in trust for the future State to be erected out of the territory (acquired without any limitation of treaty or deed of cession) the tide land or soils of the navigable waters or anything whatever of "proprietary right," nor to hold anything else in such trust except that intangible thing, that governmental jurisdiction, called inalienable sovereignty, such as eminent domain.

These soils of navigable rivers, as will be seen from the subjoined analysis of Pollard's Lessee *vs.* Hagan, 3 How., 212,

as interpreted by Martin *vs.* Waddell, 16 Pet., 367, and Knight *vs.* Land Association, 12 S. C. Rep., 258, are beyond question "proprietary" and salable both by the original sovereign proprietor and by the State or any other person as its grantee.

It is also plain from that analysis these "proprietary rights" are not essential parts of the sovereignty of a State of the American Union, but are subject to treaty upon acquisition of the sovereignty and sale and conveyance by United States patent.

It follows, therefore, that since the tide land is a "property" right that is salable, the United States, as the original absolute proprietor of the same, not subject to any contract in the deed of cession, nor to any treaty stipulation upon its acquisition from a foreign power, nor subject to any trust inherent in the nature of the Federal Union, can sell it or impose an easement or other burden upon it before it grants it away to the new State, if it should conclude so to grant it, which it is under no constitutional or contract obligation to do.

That such a constitutional limitation exists, however, and imposes upon the United States at the time of its acquisition of any new territory by conquest or discovery and occupation or by treaty, without regard to the terms of the treaty, a trust for the future State as to the "proprietary title" to the beds of *all* tidal navigable waters, and renders void any attempted sale thereof, or of any private easement therein to a high bank owner by the United States, is claimed to have been established by the case of Pollard's Lessee *vs.* Hagan.

There is no other foundation for that doctrine. If that case fails to sustain that doctrine, the whole claim of original inherent State sovereignty in the tide lands utterly fails.

That claim is based upon the idea that the tide land is part of the sovereign right of "eminent domain" under the loose dicta of that case, and is not a property—"proprietary"—title and salable, but is a part of the inalienable sovereignty of the State that by its nature could not be sold by the United States. If it appears that it has not this character of inherent sovereignty, but is salable property, the claim falls to the ground.

But the decision in that case concedes the "property" character of the soils of tidal navigable rivers. It simply *held* that as to that particular new territory acquired by Georgia's deed of cession to the United States it was not the *intention* of the grantor, according to the true construction of that deed, by the words "public lands" to convey the soils of tidal navigable waters and the fish therein (which "proprietary rights" were held by a different and peculiar prerogative tenure) to the United States as its own absolute property, but only in trust for the future State, and that having by the act of Congress of 1818, admitting Alabama into the Union upon an equal footing with the other States, parted with its title, whatever its title may have been, its patent for that tide land was void, because it had previously parted with its title. No question arose as to whether it had by its deed for the high land, prior to the act of admission or ever, granted an easement to the navigable waters. It simply held nothing was acquired by the United States patent of 1836.

It is therefore plain that there is no general constitutional principle derivable from Pollard's Lessee *vs.* Hagan, that fastens any trust whatever upon the Federal Government in favor of the unborn State for the title to the soils of naviga-

ble rivers, nor that prohibits their sale by the United States or any easement therein, so far as regards such soils the title to which in the United States was not obtained under a like deed of cession, but was obtained by the United States by discovery and occupation under the law of nations, unaffected by any trust, contract, or treaty whatever.

If there be any trust for the future State, as per scattered *obiter* of United States judges, it is purely a voluntary trust and subject to be displaced by grants prior to the act of admission of Oregon and subject to a reasonable construction as to the intention of the donor not to cripple itself or do wrong to its previous grantees.

The uniform ruling, also of the Interior Department is that while the "tide land" is not included in the terms "public lands" that are by the United States laws authorized to be sold, yet in all cases of accretion that new land is also held not to be "public lands" of the United States, but the property of the bank owner, which could not be if it were true that the United States had not the power to grant the easement of a "river boundary"—exclusive access from his front to the "navigable waters"—which boundary advances or recedes with the river, except in sudden avulsions.

And this immemorial ruling of the Interior Department is based upon the doctrines of this Court as to accretions, found in the case of County of St. Clair *vs.* Livingston, 23 Wall, 46, and elsewhere.

These propositions, then, being settled, it is apparent that the title of the State to the soils of the tidal navigable waters, if it has such a title, accrued only by virtue of Sec. 2 of the act of Congress of February 14, 1859, admitting Oregon into the Union "upon an equal footing with the other States in all respects whatever," and is purely voluntary.

The title under this grant of the tide land (soils of tidal navigable rivers) to the State is taken also, subject, of course, (1) to the previous grant of an easement over it to a grantee of the United States for the high land with a "river boundary," which grant is to be construed by the United States courts; (2) subject to the construction by the United States courts of that grant itself to the State, whether that grant was with a reservation to the United States of this important right of wharfage for its unsold public lands, including present or future sites for its forts and other public works of the United States, which are all affected by this question, including the wharf property at Fort Stevens at the mouth of the Columbia, already granted by the State of Oregon to B. C. Kindred; (3) subject to the national constitutional right of control over commerce and navigation.

That this grant to the State is thus subject to United States reservations or grants of easements is manifest; for the grant to the State, if in execution of any trust whatever, was only in execution of a voluntary trust, and it could not be fairly construed to pass or to intend to pass to the State an easement of no value to the tide land as such, nor to the purpose for which the theory in Pollard's lessee supposed the cession

deed created a trust, and valuable only to the grantor's high land while its possession by a third person would be of fatal injury to that high land. Here it may be explained that the only reason why Georgia and New Jersey or any of the original 13 States have that riparian right and have the right to construe their grants of the high land adjacent as to whether that easement was intended to be granted with the high land, is simply and only and plainly because they were the original sovereign proprietors of the high land and soils and as such sovereign grantors to private grantees have the final right to construe their own grants. They have not ceded that right to the United States nor the legal title to the soils of the rivers nor the riparian right if they construe their grants of high land not to carry them. Those original States simply ceded by the United States Constitution to the United States the easement, or governmental rights of commerce and navigation, over those rivers. On the other hand and for a like reason the State of Oregon has never had these original rights. They all belonged to the United States by the highest and best of titles. As such original proprietor it, like Georgia, retains or reserves all of those rights it has not granted; but, further, it retains the right not only to construe its grants to the bank owner but also its grants to Oregon. Manifestly it has never granted to Oregon this natural easement of the high land to wharf out to the navigable parts of the great "public highways" it has created in all of the public lands for the benefit and advantage of the owners thereof.

These clear doctrines of the law need only be stated to this eminent tribunal to insure their acceptance. A brief of the authorities herein is submitted below simply for the convenience of the Court.

The *power* of the United States to grant an easement of wharfage in the "public highways"—the public navigable waters—of the United States, as an appurtenant to its grant of its adjacent highland (to say nothing of the vital value of this right to the highland) being thus demonstrated, the chief point of contention is settled. It only remains to inquire whether the United States has granted this easement by its patent to Shively for its adjacent highland with a "river boundary."

The allegation of the counter-claim is that the United States did in 1854, by its patent under the act of September 27, 1850—the Oregon donation land law—grant to John M. Shively the high land bounded on the north by the Columbia river.

It may be conceded that this allegation of "bounding" on the river is limited by the public land laws to mean that its northern boundary meandered with the Columbia river, though more may well be claimed for it, as an undenied allegation of "bounding" on the river that settles the fact of a grant of an easement over the unnavigable tide flats if the power to grant existed.

It is the settled construction of those public land laws, however, that—

In all cases of United States patents for lands meandered upon a public navigable river the river itself is the boundary and not the meandered line as actually run.

This is entirely settled by the often affirmed case of Railroad Co. *vs.* Schurmeier, 7 Wall., which is not that the

actual high tide line is the boundary, but the river itself as a "public highway."

That this is the true meaning of that case is apparent from the act of Congress of May 18, 1796 (U. S. Rev. Statutes, § 2476), expressly declaring all "navigable" rivers—not all fresh rivers of the United States—to be "public highways" where they ran through the public lands. Nothing could be more apparent than this evident purpose to attach to the adjacent lands the appurtenance of exclusive right of access to this public highway in every respect as fully as in case of any public road. And, in respect to the nature of public navigable rivers, to give this exclusive easement to the bank owner for all the purposes of commerce and navigation to which such a river highway could be applied. It is a proposition so sound and reasonable it needs no support from authorities.

But analogous cases are submitted, in the brief, of the exclusive right of access belonging to adjacent land bounded on a public road the title to which was in the State or some other person than the grantee.

The exclusive and property character of this boundary and right of access is, however, most clearly settled in Yates *vs.* Milwaukee (10 Wall., 499). It was there plainly held, in an opinion delivered by one of the clearest legal minds of the century, that this river boundary in the patent was a grant of an easement of wharfage out to the navigable waters over the flats of the river.

Nor was that doctrine held on the score that the river was fresh. Such a distinction has long been exploded. Nor yet on the ground that, being fresh water, the bank owner had the legal title to the bed of the stream to its center, for the

court expressly declares the right in the bank owner, even though the State be the owner of the bed of the river.

Not only so, it is the first principle of common law a student of Blackstone learns—the grant of a way implied from a grant of land surrounded by grantor's other land, the implied grant of all things necessary to the enjoyment of the thing granted (2 Bl. Com., No. 36), the grant of a way over the unnavigable flats out to the public-traveled highway over grantor's land. Without this right the grant of a river boundary would be worthless. It would not convey the benefits of commerce and navigation, for which alone the river boundary is valuable, the exclusive right of "access" from his front, as tersely stated by Blackstone in 2 Com., page 226. This, too, is in the interest of commerce. (King *vs.* Russell, 6 Barn. & Cress, 368.)

There is no doubt whatever that the ancient Saxon grants of land with a bounding on navigable waters was held to give the bank owner these rights. This vital right had been invaded by the Norman conquerors. The Great Charter of King John, which is declared by Mr. Littleton to be only a reaffirmance of the ancient laws, expressly protected these "riparian" rights. Article 47 reads: "All forests which have been made in our time shall be immediately disforested, and it shall be so done with Water Banks which have been taken or fenced in by us during our reign."

See Thompson's Magna Charta, second charter.

The word *riparias* there translated "water banks," is the origin of the term "riparian rights." King John was forbidden to "fence up our water banks;" yet the claim of defendants in error is exactly the same as that which was neces-

sary to be defended in the fundamental law, and which has always been recognized since then through English and American history until the singular misconception of Pollard's Lessee *vs* Hagan, after the year 1844.

Again; this right is recognized in the case of Railway Co. *vs.* Renwick (102 U. S., 180) to be in the bank owner. It is there held that a use of the easement by the bank owner in violation of United States regulations, even, was an exercise of his right good against all but the United States, which, having legislated upon the subject of this easement of the bank owner in the navigable waters of the United States, was the sole party entitled to object.

But the most conclusive principle in favor of the bank owner's riparian right is that distinctly announced by the highest court of Great Britain in Lyon *vs.* Fishmongers Co. (1 App. Cas., 662), to wit:

The bank owner has this right of exclusive access *ex jure naturæ* by force of the situation of the lands, and it requires an exception from or a reservation in the grant to exclude it.

See cases in brief subjoined; see also Gould on Waters, § 148.

A right by the law of nature! It is so declared also in St. Clair Co. *vs.* Lovingston (23 Wall., 68, A. D. 1874), in considering the law of accretion. So, too, Chancellor Zabriskie, in Stevens *vs.* Paterson (34 N. J. (Law), 532), A. D. 1878, eloquently declared that it is founded in a Natural Equity.

Where the owner of the riparian right of wharfage lays out a town on the tide flats between ordinary high-water mark and the

channel and sells a block bounded, according to a plat, by a street or way and not "bounded by the river," the grantee takes only the block described on the plat to the center of the street in like manner as in case of plats on high land.

It only remains, then, to inquire whether John M. Shively, by his deed for a block on the tide flats, bounded on a street according to the plat of the town of Astoria laid out by him upon the navigable waters, has sold any more of those flats than the block itself.

It cannot be denied that he can subdivide this important property right into such parts as he chooses and sell them in such parcels as he desires. It is simply a question of what he intended to sell. The fact that the United States has the power to dig out the channel to the high bank does not affect this right. The title is good against every one else. Besides, in this case the counter-claim alleges the United States engineers have established harbor lines beyond this property in controversy. Also that the State has dedicated the streets out to the channel.

Shively's intention to grant only the block is plain, and the authorities below cited are full upon that point. The fact that there were tide flats north of the plat in 1860 does not change the construction. Tide flats cannot be appurtenant to tide flats any more than land can be to land. In such a case what is not described is not granted. What does not appear does not exist. Shively still owns the lots on the bank to which the appurtenant right attaches. He has only sold a part of that appurtenance—a block on the north side of the plat, bounded on a street, according to the plat, and beyond that north block (under plat of 1854, but not of 1864), are tide flats for 500 feet out to the navigable

waters. The deed does not not undertake, nor does the plat, to grant a "river boundary" to the front block, but only a street boundary. Under these circumstances no doubt can exist as to the intention not to sell anything beyond the center of the street.

NOTE.—This clear doctrine of reservation by plat also clarifies the converse doctrine of a "river boundary." Where a grantor grants a river "boundary" he grants all the rights he has out to the channel, including the title to the soil in case of non-navigable rivers, if he has it, or only the easement, if that is all he owns.

The counter-claim of defendant (plaintiff in error) is the cross-bill of the old equity practice (Hill's Code of Oregon, sec. 393), and is equivalent to an original suit for possession of this wharfage property and for an accounting for the rents and profits.

For such an incorporeal hereditament ejectment will not lie, but equity alone has jurisdiction to furnish a remedy, if there is the right, as settled in Parker *vs.* West Coast Packing Co.. 17 Or., 510.

Under § 246 (1) of Hill's Oregon Code plaintiff cannot dismiss his suit if a valid counter-claim has been filed. Hence if Shively owned the easement of wharfage it was error to allow plaintiff to take a nonsuit and to refuse plaintiff in error the relief asked for by his counter-claim. #

The United States is the final arbiter of the rights claimed under the United States patent. It is strictly a Federal question. It is not a question o

State Supreme Court aff dept to maintain appeal & by deciding on merits.

right between citizens, but is a question of paramount title between the State and Federal governments that cannot be left to State decision, especially as it does not affect the State's inalienable sovereignty.

The defendants in error, however, claim the question of whether the easement exists in favor of the bank owner is a matter within the final jurisdiction of the State supreme court, to be settled according to municipal law and State policy, which is a brand new name for grabbing a hundred million dollars of property from the United States and its grantees on the Pacific slope.

They claim that certain decisions of this court hold that doctrine, but they do not seem to have any distinct principle of constitutional or other law upon which to found this claim, if the theory of plaintiff in error is correct as to the source and nature of the title. Their claim depends solely on their *construction* of those decisions. If the State were the absolute and original source of title, as original constitutional *cestui que trust.* of this tide land and wharfage right, as they claim, then it would not be disputed that the State supreme court would have final jurisdiction to adjudicate upon the issue of title between private owners. If, however, the origin and nature of the title be as claimed by plaintiff in error, there seems no room for contention against our position, that the Federal Supreme Court and not the State supreme court has the final jurisdiction to construe this patent and determine between the claims of the bank owner and the State or its grantees.

In the first place, it is hardly a reasonable proposition that the State should sit as judge in its own cause where the origin of the title was in a higher and an impartial power.

In the second place, no sovereign power having jurisdiction was ever known to voluntarily abdicate it and concede to another sovereignty the right to construe its own grants.

In the third place, the statute (§ 709, U. S. Rev. Statutes) under which this writ of error is sued out has been on the statute books for nearly a century and it contemplates what every self-respecting nation must insist upon, that the United States Supreme Court shall be the supreme arbiter of disputes as to the true construction of its grants.

Again, the cases relied upon by defendants in error do not sustain their claim of final right of decision in the State supreme court in such cases.

St. Louis *vs.* Myers (113 U. S., 566) simply held that the act of admission of the State of Missouri declaring the Mississippi river a "public highway" did not purport to repeal or affect the bank owner's conceded riparian rights nor purport to grant to the city of St. Louis a public way at the end of the street over plaintiff's riparian rights. The bank owner had damages. The city took a writ of error. The writ of error was therefore dismissed as not presenting a Federal question. In "such cases," the court say, the matter of the damages must be "left" to the State adjudication. If, however, the State court had denied the bank owner's riparian right under his United States patent a Federal question would have been presented.

Railway Co. *vs.* Renwick (102 U. S., 180), *held* a Federal question, under the act of Congress regulating wharfing on the Mississippi, was involved. It distinctly held, however, the bank owner's wharfage right was, after that legislation, not subject to State forfeiture nor to any defeasance except by United States action.

There is another distinct class of cases under which the claim of the State's final right of decision is made—that is, upon the question of whether the *legal title* to the beds of navigable waters is in the State or in the adjacent bank owner. That line of decision is simply that the United States Government having relinquished the legal title to the soils (not to the wharfage rights of the high land) to the States by the acts of admission, it is a question purely of State legislation or decision as to whether the bank owner or the State shall hold that legal title. In either case the legal title is subject to the paramount right of the United States for navigation and commerce, and also to the bank owner's easement (see Gould *vs.* Waters, § 148), to connect with that commerce and navigation. The cases on this point are collated in the "brief" below. Only two other cases on that line need attention—Hardin *vs.* Jordan, 140 U. S., 37, and Packard *vs.* Bird, 137 U. S., 661. They plainly do not hold the doctrine. (See analysis in brief.)

A Distinction Noted.

It should be noted that the briefs of the counsel for Illinois Central Railroad Company, appellant in the "Lake Front cases," all affirm the doctrine not only of the original and *absolute*, instead of derivative, title of the State of Illinois to the soil of the lake, but also the absolute riparian dominion of the bank owner under his United States patent out to the navigable waters (wherever they may be) over the same property, as held in Yates *vs.* Milwaukee. It would seem at first that there is an "irrepressible conflict" between the two titles as stated. If the State's title was original and absolute the United States could not impose

an easement on that tide land. It would be void. It would then all have to be left to State policy and decision.

While not conceding that it can be absolute in tide lands, acquired by the United States free from all conditions by discovery and occupation, though it might possibly be absolute in the tide lands acquired under the "deeds of cession," we suggest a distinction that may reconcile the two principles. We also further premise that it cannot be "inalienable sovereignty" under Knight *vs.* Land Association (1891), 142 U. S., 161, for if it were so essential to the fundamental equality of sovereignty that it could not be *sold* by the United States, then it likewise could not be bargained off by treaty, as was allowed by that decision, wherein Mr. Justice Field remarks the Federal Government could not make a treaty in hostility to the fundamental law. It would be a title not "recognized," as the learned justice remarks (p. 271), "by the laws and Constitution of the new Government."

Assuming, however, that the State's title to the tide land is original and absolute, the distinction is that a grant by the United States of a river boundary is not necessarily a grant of an easement in this tide land. It is a grant of a right to go from his front to the navigable waters, wherever they may be, and to have exclusive access to them from his front; also to have all accretions, which important rights add at least a third to the value of the high bank property. The absence of such a right would be a loss of millions to the "public lands" without any reason for it.

But though it is a right of access and accretion, it is not strictly an easement (rather *a profit a prendre* perhaps), for there need not be any intervening flats. Although it may

be only a *profit a prendre*, yet it is a contract right from the United States, original sovereign owner, an estate in the tide flats, in the land under the water (out to the navigable waters) in fee simple on condition that it may be defeated by the grantor or his assigns by the actual digging out of the channel to the high bank and paying for any improvements on the tide flats (Railway Co. *vs.* Renwick, 102 U. S., 180; Yates *vs.* Milwaukee, 10 Wall, 499). This "*profit a prendre*" is defined by Bouvier as "A *right* to take anything before it is offered." Where there are such intervening flats the bank owner's title over them is subject to the will of the sovereign, and only his will, whenever he chooses to make the river navigable up to the high bank. So long as he refuses or fails to do this, the bank owner has an implied right to wharf. The State or the United States where it assumes jurisdiction over the "public highway" could not cut off this "access," but it could dig the channel up to the bank just as it would to keep any highway fully open. It would have this right absolutely and the bank owner would have no right to compensation, except where he had made permissive improvements.

The grant of the river boundary may therefore be held to be distinct from and consistent with the absolute title of the State to the soils of the navigable rivers, and is plainly distinct from the class of property rights—the *jure regalia*—for which the doctrine of a constitutional trust is claimed.

The soils of the rivers, as *jure regalia*, are allowed the sovereign State to carry the reserved right of improving the public highways, taking the fish and minerals, &c., as did the King of England. The right of exclusive access was not part of the *jure regalia*. This right of access is granted or

not by the original patent of the sovereign for the high land. The right to construe that patent is absolutely in the sovereign who makes it. In the case of the original 13 States, who were the original owners, they construe their grants. In case of the new States, under the deeds of cession, it may possibly be the contractual trust might give those States the like right—that is, the right to construe the patent of their trustee. That right, however, is not recognized in Yates *vs.* Milwaukee. It would be anomalous; and, besides, it seems the right of the United States to sell the high land includes the right to sell this natural and most valuable appurtenance.

But in the case of the new States, outside of the deeds of cession, the United States is upon all sound reason and authority the sole construer of its patents, although those new States have the like rights of "sovereignty and jurisdiction" as the original States.

This constitutes the "argument" of the plaintiff in error, which is intended merely to give a concise and connected view of the phases of this question as they appear to plaintiff in error.

BRIEF OF AUTHORITIES.

The first and chief point is upon the question whether this Court has ever held this tide land to be in constitutional trust for the future State.

The following analysis of Pollard's Lessee *vs.* Hagan, Martin *vs.* Waddell, and Knight *vs.* Land Association will not only show it has not so held, but, on the contrary, has exploded that doctrine.

The Three Great Cases.

Upon the facts admitted in the pleadings it is apparent that the main and principal issue is whether or not the State is (in the absence of its own grant) the absolute owner below low tide, and hence having power to "fence up our water banks"—erect a wall between the "bank" owner and the channel, as in the tyrannous days of King John—or whether the bank owner has under the grant of the original proprietor, the United States, of the land, with the river as a boundary, the implied right to wharf out.

That issue is settled, as plaintiff in error insists, by Pollard's Lessee *vs.* Hagan and Knight *vs.* Land Association in holding, as they do in legal effect, that the title to the tide land in all the territory acquired by the United States by discovery (as in Oregon) is a private proprietary title (like that to any other public lands) derived to the State by express grant in the act of admission of February 14, 1859, and is not a title held by the United States during territorial days "in trust for the future State," under the United States Constitution by virtue of the Federal character of the United States Government, and, plaintiff in error contends, this being established as sound law by those two cases, interpreted by Martin *vs.* Waddell, 16 Pet., 367, it follows that the State's title to the tide land is taken by it subject to the construction placed upon such grant in act of admission and previous high land grants by the United States Supreme Court, and hence, as a necessary result, the third great case is Yates *vs.* Milwaukee, 10 Wall., 499, which declares in plain words the vested rights of the bank owner in the premises.

These positions will be made clear by an analysis of those three cases.

First—Pollard's Lessees vs. Hagan.

3 How., United States 219, December Term, 1844.

Error to Supreme Court of Alabama.

Affirmed.

ANALYSIS.

Plaintiff sued in ejectment for land in the city of Mobile, Alabama. He introduced his United States patent of 1836 and rested. Defendant offered parol evidence to show that at date of the patent and of the admission of Alabama into the Union the land at common high tide was covered with the waters of Mobile bay. The evidence was admitted and the judgment in favor of defendant was affirmed by the Alabama supreme court on the ground that no title passed by the patent. This judgment was affirmed by the United States Supreme Court on writ of error on the ground that the land passed to the State of Alabama by the act of admission of 1818, according to the terms of the trust deed of cession. The facts bearing on the case were matters of history. On April 24, 1802, the State of Georgia, as successor to the King by revolution, owning all proprietary rights in the public lands and in the soil under the navigable waters of Alabama Territory, and, except as ceded by the Federal Constitution, also owning the navigable waters in trust for the public, as successor to Parliament, made a deed of cession for the same to the United States *in trust by the terms of the deed* (1) to lay out the Territory into a State and (2) to admit it into the Union with the same rights of sovereignty as the original States, and also on the same conditions and restrictions with

the same privileges and in the same manner as is provided by the ordinance of Congress of July 13, 1787, for the government of the northwestern territory of the United States, which ordinance provided that "whenever any of the new States in the northwest territory [ceded] shall have 60,000 free inhabitants therein, such State shall be admitted by its delegates into the Congress of the United States *upon an equal footing* with the original States *in all respects whatever*."

The deed of cession further provided that "all the lands within the territory ceded and not reserved or appropriated for other purposes should be considered as a common fund for the use and benefit of all the United States."

The State of Alabama was admitted into the Union December 14, 1819, and the act of acceptance "disclaimed all right or title to the waste or unappropriated lands lying within the State, and that the same should remain at the sole disposal of the United States."

The United States Supreme Court held that the United States patent for the tide lands passed no title, because the United States had parted with all of its title by the act of admission of the State "on an equal footing with the original States."

Now, whether that title to the tide land passed to Alabama by virtue of its sovereignty as a State and by operation of the Federal Constitution or whether it passed as a matter of trust created by the deed of cession is the pivotal point of the entire doctrine at issue in the great controversy now raging as to the nature of the States' title to the tide lands.

The distinct holding was that according to the deed of cession and the agreement on admission "nothing remained to the United States * * * but the public lands."

In other words, that the terms "lands within the territory ceded" and "waste or unappropriated lands" in the articles of compact on admission did not include the proprietary title to the soil of navigable rivers (p. 223). This is in entire and express accordance with Martin *vs.* Waddell (16 Peters, 367). In fine, that it was a matter of *construction* as to the *intention* of the grantor [the State of Georgia] in its *deed of cession.*

It is true the court indulges in an inapplicable *obiter* when it says: "And if an express stipulation had been inserted in the agreement granting the municipal right of sovereignty and eminent domain [which "tide land" is clearly not] to the United States, such a stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a State or elsewhere, except in the cases in which it is expressly granted."

This remark, while sound as stated, was confessedly unnecessary to the decision of that case and *obiter*, and *did not apply to the facts.* (The sovereign right of eminent domain is the power to take private property for public use):

(1.) Because a conveyance of the *soil* of the river would not have been "a conveyance of municipal jurisdiction, sovereignty, or eminent domain," but only of a proprietary right which Georgia could grant to the United States or to any one and has often granted, and (2) because the court expressly holds this soil is *not conveyed* nor *intended to be conveyed* according to a fair construction of the entire agreements. (16 Pet., 367.)

It is true also that, pursuing this line of *obiter* decision for political effect, as history shows, the court devoted eighteen

pages to proving that the United States could not "exercise municipal jurisdiction, sovereignty, or eminent domain, except in the District of Columbia and other places specially ceded for that purpose."

"This right of eminent domain," remarks the justice (p. 230), "over the shores and the soils under the navigable waters for all *municipal purposes* belongs to the States within their respective territorial jurisdiction, and they only have the constitutional power to exercise it." Conceded; but that has nothing to do with the proprietary interest in the soil, which is subject to the paramount public right of navigation and fishery, any more than has the proprietary right of the United States to the uplands still held by the United States Government.

The court further remark that to give the United States the power to *transfer to a citizen* this title to the shore and soil would be to "deprive the States of the power to exercise a numerous and important class of police powers." The "transfer" to the citizen would be the one thing that would make perfect the State's right to exercise "eminent domain" over it. Whether "eminent domain" can be exercised by the State over any of the lands—upland or low land—held in "proprietary" right by the United States is perhaps not entirely settled. But the objection would apply equally to tide and to high land. Yet no one ever raised this objection as to the United States patent for the high lands in the States west of the Mississippi, though Justice Catron (dissenting) said it was urged from 1840 to 1844 in the political arena as to the ceded northwest territory—it being claimed that the high land also went to the new State on her admission—and he remarked "it is difficult to see

where the distinction lies." Still a distinction might be drawn in the nature of the two species of property, in construing the intention of the grant and in considering the valuable fisheries and oyster beds beyond all reach of ownership in connection with the high land. In fact it was distinctly drawn in a case cited by the court, Martin *vs.* Waddell, 16 Pet., 367, analyzed herewith as interpreting this decision.

The court concludes that:

(1.) The shores and soils of navigable waters [in the original thirteen States] were not ceded by the Constitution to the United States [granted].

(2.) The new States have the same rights [by the deed of cession], sovereignty, and jurisdiction over the subject as the original States. [This is granted also as applicable to that case.]

(3.) The right of the United States to the "public lands" conferred no power to grant to plaintiffs "the land in controversy."

Which last proposition, also, is not denied or impugned by the doctrine herein contended for, and hence the effect of the decision must be limited to the proposition that the United States patent was void because *by the true construction* of the *deed of cession* the tide lands were held, *under and only by virtue of that deed*, by the United States "in trust for the future State;" and by virtue of and pursuant to that trust and by virtue of that act of admission in 1819 "on an equal footing" (and not by any constitutional trust) the proprietary title had passed to the new State of Alabama; and

hence there was no jurisdiction in the land department to issue a patent for same.

The case does not establish a *general principle of* constitutional law that the *tide lands in all Territories* of the United States, acquired otherwise than by said deed of cession, must be held "in trust for the future State."

The decision is sustainable on various clauses of the deed of cession outside of the "sovereignty" clause.

In fact the whole volume of *obiter dicta* on the subject arose out of the careless confounding of the proprietary right of the King (which though a right of the sovereign was not a sovereign right) with the sovereign public right of Parliament in the waters of navigable rivers. The heated state of the public mind on State sovereignty at that period and the eager desire for political *dicta* will easily account for the confusion of ideas or rather of expression.

A significant clause in the majority opinion (p. 224) shows that the *intention* of the *parties* to the *deed* and not the constitutional trust theory was the true ground of affirmance: "The *object of all the parties* to these contracts of cession was to convert the land into money for the payment of the debt, and to erect new States over the Territory thus ceded; and as soon as these purposes could be accomplished the power of the United States over these lands *as property* was to cease."

See Martin *vs.* Waddell, 16 Peters, 416.

It should also be noted the court say (p. 225) the "principal argument" against the title of Alabama is the claim that the United States "acquired from the King of Spain the right (under Spanish laws) to dispose to a subject of the soil

under navigable waters," but they show the title was not thus acquired, and impliedly conceding *if it had been thus acquired* it would not have become the property of Alabama under any theory. In a word, that the title of Alabama was derived solely from the deed of cession as a trust deed.

The soundness of the preceding analysis of the doctrine of that great case is manifest from a few clean-cut undeniable propositions of the common law.

1. This title of the king was on the common law theory that the Crown was the source of title, the original owner of every right pertaining to realty, including the navigable waters, and, presumptively, had not granted them nor the unmaniorable waters under them.

Martin *vs.* Waddell, 16 Pet., 367.

2. But while the ancient kings sought to claim their title to the navigable waters as a *jus privatum* it is held that light, air, and running water are by the law of nature free and public (Gould on Water, § 47) [even as doth the Fishmonger's case say of the bank owner's right] and Magna Charta established that the King's title to the waters was in trust for the people and to be regulated by Parliament, and that his title to the soil of navigable rivers, while it is *jus privatum*, is subject to this natural public right.

Gould on Waters, §§ 3, 17.

3. Magna Charta also established that the *jus privatum* of the King was held subject to the right of access, the easement of the adjacent owner to reach those navigable waters from his front for all beneficial uses of navigation and commerce, where the original grant of the crown did not

restrain him to the upland, but bounded his land by the river, which none of the ancient Saxon grants did. This is the plain doctrine of that instrument.

4. And this right of access was recognized as a substantial right by all the common law courts of England, and America also, until about the time (1844) of Pollard's Lessee *vs.* Hagan.

2 Bl. Comm., 226.
King *vs.* Russell, 6 Barn. and Cress., 368.
Hale de Jure Maris, ch. 4, 1 Wall., 68.
5 Barn. and Ald., 268.
3 Kent Com., 417–525.

5. While the *jus publicum* in the waters could not be aliened by the King, but was held in trust for the people, the *jus privatum* of the King in the soil of the rivers was salable and could even be acquired by prescription.

Gould on Waters, §§ 3, 37.

While it was (as being unsold) a right of the sovereign it was not a sovereign public right that was inalienable, like the right to the running waters. It was only the right of the sovereign because he had not sold it, and he had not sold it because it was in the main waste lands—"unmanorable."

Gould on Waters, §§ 18, 19, 21.

6. This *jus privatum* of the King, so far as it was unsold at the Revolution, became the property of the State of Georgia by succession, and was held in the same title. That title—the *jus privatum*—is the basis of the decisions of the United States Supreme Court upon the rights held by

one of the "original thirteen" for its own citizens that were not ceded to the citizens of the United States as "a privilege or immunity" granted through the Federal Constitution to the citizens of other States.

McCready *vs.* Virginia, 94 U. S., 391.

Smith *vs.* Maryland, 9 How., 71.

Even as the King could grant his *jus privatum* to any one in severalty so could the State. It was not an inherent part of the sovereignty. Of this class of rights were the oyster beds.

Martin *vs.* Waddell, 16 Pet., 367.

7. The State also succeeded to the title of the King and Parliament in the navigable running waters in her borders. This was a jurisdictional right, and as such it was ceded for international commerce and navigation to the United States by the United States Constitution. This was strictly a governmental or sovereign right. In so far as it was not ceded by that (and the admiralty clause) of the United States Constitution it was retained by the State, including the right to regulate United States vessels relative to oyster beds.

Gould on Waters, §§ 38, 189.

And as to numerous police regulations.

Hence the State of Georgia at the revolution acquired, as successor to King and Parliament, all of these rights in the navigable waters of the territory of the present State of Alabama. She retained all of these rights, except as ceded by the Federal Constitution of 1788, until she executed a "deed of cession" in 1802 of that Alabama terri-

tory to the United States *in trust* to create Alabama a sovereign State of the Union. The title of Alabama to the soil of the navigable waters depended upon the terms of that deed of trust from Georgia—the original source of title. In that sense and under that deed alone the United States became "trustee for that future State" as to private *proprietary rights.* And upon familiar principles of law the trust became executed in the use when Alabama became a full-grown State—of age. It would have been so even though the act of admission had contained no grant in the words "on an equal footing" with the other States. The "trust for the future State," so far as the *inalienable sovereignty* was concerned, could not be created by the deed of cession, as correctly announced in 3 How., 212. That was inherent in the Federal character of the United States Constitution. The only trust that Georgia could create by deed was as to its proprietary rights—rights of property. What trust, as to these, was created was for the United States Supreme Court to decide *upon the trust deed only.* It is not to be doubted that if the deed of cession had expressly granted to the United States, in fee simple, the title to the soil of all navigable rivers, it would have been a valid and constitutional grant. The right of the *State* to *sell* it to private use is the basis of this and of all kindred cases.

There is no reason why the United States could not be the grantee of the *jus privatum* as well as any private individual. Well, the United States Supreme Court held the fee to the soil of the rivers was in trust for Alabama, and passed to her on her admission by force of that trust and that act of admission. And of course, as holding this title from Georgia, she would have the same right to construe its

relation to the upland owner as Georgia, or as New Jersey, the original source of title (Hoboken *vs.* New Jersey, 124 United States, 656), for no claim of appurtenance arising from a United States grant could arise in one of the original States, which was the source of title.

That case of Pollard's Lessee was the foundation of all the vexed questions relating to tide-land titles in America. It was construed by many State courts to hold that the State was the absolute owner of all below low tide against any grant, Federal or *foreign*, either for tide land or riparian rights.

It was given an exaggerated importance and was even held to settle adversely all rights of riparian owners, when, in truth, it did not decide anything on the subject. It simply held the United States had parted with its title in 1818, and its patent in 1836 for the tide land was void for that reason.

It did not even decide that under the "deed of cession" a United States patent for the tide land prior to the admission of Alabama would have been void or chargeable with a trust for the State's subsequent grantee, which is itself more than doubtful.

9 How., 477.

The highest and ablest courts of America and England have, since the first shock of that unduly magnified case, worked out (as will be shown in connection with Yates *vs.* Milwaukee) the doctrine that the adjacent owner of land "bounded" by a navigable river has, both by common law and by the law of nature, absolute vested riparian rights, independent of the doctrine herein discussed of this being a

Federal right arising under a grant by the United States Congress to be construed by the United States Supreme Court.

A Kindred Case.

Martin *vs.* Waddell, 16 Pet., 367, A. D. 1842, error to United States circuit court, New Jersey, Taney, C. J. Ejectment.

This action was brought for 100 acres of land covered with water lying beneath the navigable waters of the Raritan river and bay where the tide ebbs and flows. It involved the right to the oyster fishery in the public rivers and bays of East New Jersey.

This case settles the correctness of appellant's analysis of Pollard's Lessee *vs.* Hagan. Plaintiff's title is derived from a charter of Charles II to the Duke of York, in 1664, who conveyed to the twenty-four proprietors of East New Jersey with all the rights of property and government conferred on the Duke by that charter.

In 1702 the proprietors surrendered to the Crown all the powers of government, retaining their rights of private property. Hence the question was whether the title to the soil of public rivers was private property, or made a part of the powers of government, according to the true construction of that original charter. The decision was not *placed on the technical construction.*

The courts say (p. 40) in deciding the question they look not merely to the strict *technical meaning* of the words of the letters patent, but to the laws and institutions of England, history of the times, object of the charter, *contemporaneous construction*, and usages under it for a century or more.

"*It is not a deed conveying private property to be interpreted by the rules applicable to cases of that description,*" but an instrument organizing a government.

Thus construing the charter they hold the word "soils," though technically appropriate to pass lands covered with navigable water, yet is associated in the patent with "other royalties," and was conveyed as such. "No *words are used* for the purpose of separating them from the *jure regalia* and converting them into *private property*, to be held and enjoyed by the Duke apart from the political character with which he was clothed by the same instrument (p. 413). They say also (p. 414) that those pioneers could not have been expected "*to encounter the many hardships that unavoidably attended the emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property; and the settler upon the best land thereby excluded from its enjoyment.*"

The doctrine, however, that this prerogative right of the King was severable by express grant, and could become private property, is plainly shown by the court, as may be seen by a few extracts from Chief Justice Taney's opinion.

"The English possessions in America," say the court (p. 409), "were * * * claimed by right * * * of discovery. The country * * * was held by the King in his public and royal character as the representative of the nation and in trust for them. * * * The doctrine upon this subject is clearly stated in * * * 8 Wheat., 595. In that case the court proceed to say: 'If the discovery be made * * * under the authority of an existing government which is acknowledged by the emigrants * * *

the discovery is made for the benefit of the whole nation; and the *vacant soil is to be disposed of* by that organ of the government which has the constitutional power to dispose of the national dominions by that organ, in which all territory is vested by law. According to the *theory of the British constitution*, all *vacant lands* are vested in the Crown as representing the nation, and the exclusive power to *grant* them is admitted to reside in the Crown as a branch of royal prerogative. It has already been shown that this principle was as fully recognized in America as in the island of Great Britain. This being the principle upon which the charter was founded, by what rules ought it to be construed?' The court then states as a doubtful question [now settled in America in favor of the right of the State as representing the King and public, though, *mark the point*, the right of the *King alone to sell* has been fully overturned, as prohibited by Magna Charta, yet this claim of the State is claimed as "successor to the sovereign" and not to the Parliament. Magna Charta made the soil of the river highway a trust for the whole public] whether the *King* since Magna Charta had power to grant to a subject any portion of the soil covered by the navigable waters of the kingdom, *so as to give him an immediate* and exclusive right of fishery, either for shell or floating fish, within the limits of his grant. But it indicates that the case of Blundell *vs.* Catterall (5 Barn. & Ald., 287, 294, 304, 309) and the Duke of Somerset *vs.* Fogwell (5 Barn. & Cress, 883–'4) settles it in England against the King's right.

The point, however, could not arise in Martin *vs.* Waddell unless it were held the King *intended* to sever the bottoms of the navigable waters from the prerogative power of gov-

ernment * * * and to convert them into mere franchises in the hands of a subject to be held and used as his private property; and we the more willingly forbear to express an opinion on this subject because it has ceased to be a matter of much interest in the United States, for when the Revolution took place the *people* of each State became themselves *sovereign*, and in that character hold the absolute right to all their navigable waters and the soils under them [though the "soils" are still severable] for their own common use, subject only to the rights since surrendered by the Constitution to the General Government. A grant therefore made by their authority must * * be * * determined by different principles from those [more liberal construction] which apply to grants of the British Crown when the title is held by a single individual in trust for the whole nation."

The Court refers to the fact of many cases being cited as to the degree of strictness required in the construction of royal grants. They say: "The dominion and propriety in navigable waters and in the lands under them being held by the King as a public trust, the grant to an individual of an exclusive fishery in any portion of it is so much taken from the common fund intrusted to his care for the common benefit. * * * Grants of that description are construed strictly; * * * but in the case before us the rivers, bays, and arms of the sea *and all prerogative rights* within the limits of the charter undoubtedly passed to the Duke of York, and were intended to pass." They proceed then (p. 411) to say: "The questions upon this charter are very different ones. They are * * * whether in his hands they were *intended* to be a trust for the common use of the new community about to be established or private property to be parceled and sold to individuals for his own benefit."

The Court then decided (p. 412) that the former was the purport of the charter. They then cited Hale de Jure Maris (Harg. Law Tracts, 11) to the effect that though the King is owner of the sea and its arms *as waste* and has the primary right of fishing, yet the common people have regularly a liberty of fishing as a public common of piscary, except in such places where either the King or some particular subject hath gained *a propriety* exclusive of the public liberty, and they remark that the only question is whether since Magna Charta the King or any subject can gain such propriety. The Court conclude that the surrender by the proprietors embraced these rights.

They say (p. 416): "We give the words of the surrender as found by the special verdict, and they are broad enough to cover all the *jura regalia* which belonged to the proprietors." They yield up "all the powers, authorities, and privileges of and concerning the government of the province," and the right in dispute was one of these authorities and privileges.

"Whatever he [the Duke] had as a royal or prerogative right was restored, with the political power to which it was incident; and if the *great right of dominion and ownership* in the rivers, bays, and arms of the sea and the soils under them was to have been severed from the *sovereignty* and withheld from the Crown * * * the design to make this important change in this particular territory would have been clearly indicated by appropriate terms and would not have been left for inference from ambiguous language."

Here the doctrine is plainly stated that the proprietary right to the soil is not a part of the *sovereignty* and is severable and salable, and whether parted with or not is only a

question of construction of the language of the grant. This settles in appellant's favor the construction of the decision in Pollard's Lessee *vs.* Hagan for which he contends, viz., that the Supreme Court simply held it was not the intention of Georgia to pass the fee simple title to the tide lands to the United States, but to pass it in trust for the future State of Alabama, and that there is no general principle of constitutional trust established by that case.

The Court concluded (p. 416): "And when the people of New Jersey took possession of the reins of government and took into their own hands the *powers of sovereignty* the *prerogatives* and *regalities* which before belonged to the Crown or Parliament became immediately and rightfully vested in the State;" and hence while Georgia as well as New Jersey could have conveyed the tide lands in fee to the United States she did not do so.

In this way of reading Pollard's Lessee by the light of Martin *vs.* Waddell the mists of half a century on this vexed question are cleared up.

This distinction between the proprietary title and the sovereign title in the tide lands is also clearly stated in Hoboken *vs.* Penn. Railroad Co., 124 U. S., 681: "That public right is entirely distinct in its essential qualities from the title of the State in lands under tide waters. The former inheres in the State in its sovereign capacity. The latter is strictly proprietary."

Second.—Knight vs. Land Association.

142 U. S., 161.

Error to the Supreme Court of California.

Reversed. Ejectment.

STATEMENT OE THE CASE.

The U. L. Association, claiming under a State patent for tide land in a navigable estuary of San Francisco bay, brought an action of ejectment against Knight, who was in possession under United States patent, and failed. To show the original title to be in the State the plaintiff proved by parol that the premises were in 1846 below ordinary high-tide line and the estuary was then navigable.

Defendant offered in evidence United States patent for the San Francisco pueblo lands issued June 20, 1882, on a survey of 1881. It was objected that the State of California, being admitted into the Union in 1850, acquired title to that tide land by virtue of her sovereignty and, as to such lands acquired by virtue of her *sovereignty*, she did not hold it by *jus privatum* and was not bound to present her claims to the United States land commissioners under the act of Congress of March 3, 1851, entitled An act to ascertain and settle the private land claims in the State of California.

The facts found were that the premises were below high-water mark July 7, 1846, the date of the conquest of Mexico, and ever since. Under the act of Congress of 1851, the city of San Francisco as successor to the Mexican pueblo of that name applied for confirmation of its right as such successor, and for a patent from the United States.

In 1854 the board allowed it in part. On appeal to the United States court a final decree was had in favor of the city under which, it is now held, its patent line embraced the estuary, and a United States patent was issued accordingly. *The State was not a party to the decree.* The supreme court of California held the United States patent void because the State acquired title to the tide land upon her admission into the Union September 9, 1850, and while this title was subject to defeat by the United States court decree under act of 1851, yet, as that decree did not embrace this tide land, the United States patent was void as going beyond the decree. The United States court held that it was included in the decree and the United States patent was in pursuance of that decree. But the State's counsel, on the appeal, went further and insisted that admitting all this, *yet since the parol evidence showed the premises below ordinary high-water mark of a navigable arm of the sea at the conquest,* the United States patent must be void, as the title passed to California on her admission "*by virtue of her sovereignty* over tide lands," not *by virtue* of the act of admission but of its inherent "sovereignty over tide lands."

"To this contention we cannot give our assent," say the court. *Held* there was error in admitting the parol evidence, (1) because the United States patent is *conclusive* upon all persons *claiming in privity with the United States;* and (2) because the concession of the Mexican Government was binding on the United States.

Justice Lamar in considering this question of the admissibility of the evidence remarks that it is "the settled rule of law in this Court that the *absolute property* in and dominion and sovereignty *over the soils* under the tide waters in the

original States were reserved to the several States," citing several cases. But those cases held nothing as to riparian rights. They (especially Pollard's Lessee) simply hold the United States *had no title at the time of its grant* of those tide lands in those States, and its patent was therefore *void*.

He also remarks: "And that the new States since admitted have the same rights, sovereignty, and jurisdiction in that behalf as the original States possess within their respective borders." There is no decision other than as to the States embraced in the "deeds of cession," and not in them as to riparian rights.

He further says: "Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to the upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory." As heretofore shown, there is no such general constitutional principle established by the cases cited. If, as to States made out of territory acquired by discovery or conquest, they hold the tide lands in trust, it is a voluntary trust, a matter of policy (see Justice Miller in Barney *vs.* Keokuk), and not of constitutional necessity. That the Court only meant a voluntary trust is apparent from the next statement, that the trust holding does not apply to lands previously granted or charged with a trust by the former government. For if it were inherent in the federal character of the Government that the tide land is an essential and inalienable part of the State's sovereignty, then the United States could not acquire the territory bereft of that sovereign right. It would be a title not "recognized," as Justice Field remarks (p. 271), "by the laws and constitution of the new Government." With these

preliminary suggestions Justice Lamar proceeds to declare that since the United States acquired the title to the tide lands and ascertained *by its* court that it was part of the Mexican grant to the city that the patent following the survey and decree and embraced the land, the patent must be *conclusive on the State* as *claiming under* and *in privity* with the United States and by subsequent title.

This distinctly negatives any substantial, original, sovereign, inalienable title, even in naked trust, in the State. If the trust is not inherent in the Constitution of the Government *it is derivative entirely* from the United States. If *derivative*, it must be received by grantee, as all other gifts or voluntary trusts, subject to the conditions imposed by the United States or its accredited officers. It must, therefore, be private property that is to be disposed of to suit the original owner, the United States. To more clearly show it is not part of the sovereignty it is only necessary to substitute a Mexican grant to San Francisco of the *absolute right of eminent domain* as to the private property of the citizens. Would it be pretended that a patent of the United States for this sovereign right would be conclusive against the State after its admission to the Union? Hardly, for that is opposed to the constitution of the State and Federal governments. If, therefore, it may be affected by a Mexican title or trust, it is a proprietary right. If a proprietary right, it vests absolutely in the United States, unless some special provision in the Constitution is shown requiring the United States to hold it for the future State; but there is no such provision. There is no deed of cession from the original owner to affect it. Hence, it goes out of the United States only by its own free act, according to the terms of this decision. Why did not that

tide-land title pass by the act of admission of 1850? Because the United States ascertains that *prior to that act* the United States had assented to the Mexican Pueblo grant, and this fact having been found by its own tribunals as to a property of which it was the absolute owner, it was a *conclusive* finding against the State, a subsequent grantee.

This conclusion is the result of certain plain principles of law. The State supreme court held the State patent was valid and passed the title to the tide land. In order to reverse that decision on *writ of error* to the United States Supreme Court it was *necessary* to hold that a paramount title existed in defendant by virtue of the United States patent. To hold that the paramount title existed *by virtue of the Mexican treaty* would not create a proper ground for *error to the State supreme court.* Such a writ lies only for the protection of a right obtained from the United States. So the necessary conclusion is that the United States court held the title to the *tide land* was derived from the *United States patent.* To reach that conclusion it was necessary to hold that the act of admission of 1850, "on an equal footing," was not, on a fair *construction, intended* to convey to the State of California the tide land already promised by the United States to some one else. In a word, that, while the United States *could* have violated its treaty agreement and *could* have conveyed that tide land to California, as a matter of jurisdiction and power it did not do so nor intend to do so. Its grant to California by admission act was construed in the light of the existing situation and this tide land held to be exempted from the grant. If immediately upon the conquest this tide land became a naked legal trust in the United States as a part of

the *sovereignty* of the future State it could not be trafficked about nor denuded of its value by the holder of the dry legal title. As soon as statehood followed—the age of majority—of freedom of *cestui que trust* from legal disabilities—the *trust* would have been executed in the *use* and the State of California would have stood forth the sovereign owner of the perfect legal title. It would then have been a question for that sovereign State to have decided whether or not the Mexican grant included the tide lands, and, if so, whether such a grant to a Mexican pueblo was void as against its absolute sovereign rights. This is the logical result of the doctrine that the tide-land title is an inherent and inalienable part of the sovereignty of the State.

But it is totally inconsistent with the actual result of the decision of the United States Supreme Court. To hold, as in Martin *vs.* Waddell, that the title is *jus privatum* and salable and a severable part of the King's prerogative rights, and, as in Pollard's Lessee, that it is a question of intention, whether or not the original owner has parted with that title by his grant, is to make the doctrine of the case entirely in accord with the position of appellant in Knight *vs.* Land Association—that the United States is, like the King of England or the State of Georgia, the absolute original first proprietor and source of title as to all the soils of navigable waters in all territories acquired by the United States by conquest or discovery. It is also to reduce the doctrine of such titles to a common-sense, honest basis, rid of the mists of a half century of modern King Johnism.

These propositions were necessarily held by the United States court in overruling the objection of the land association, that "the State of California acquired her title, *by virtue*

of her sovereignty, on her admission into the Union, and her title could not be overthrown by declarations of the United States made after title vested in her."

When it held that its patent was conclusive against the State and prevented it from asserting any paramount King John title, it held that the State's title to tide land was derivative from Uncle Sam just like any other grantee's title and no better in any particular. It was a holding that it was not a part of the "eminent domain," inhering in its sovereignty, nor a character of title that could not be acquired by the United States under the United States Constitution except in trust as asserted in the *obiter dictum* of Justice McKinley.

This case distinctly puts at an end the doctrine of any *general constitutional principle* making the United States a "trustee for the future State" as to the tide lands, or trustee in anywise except *a voluntary trust* by the organic law of the territories applying the ordinance of 1787 to the new territories.

See act of Congress, August 14, 1848, sec. 14, 9 Stat., 323.
Also see act of Congress, August 7, 1789, 1 Stat., 51.

THE DOCTRINE ON PRINCIPLE.

As a necessary result of the true doctrine of those two great cases, the State of Oregon, being erected into a State out of territory acquired by the United States by discovery and occupation, took its title to the soils of navigable rivers by the grace of the United States under the act of admission "on an equal footing with the other States in all respects whatever," and, thus deriving her proprietary title to this tide

land, she took it encumbered with such burdens as had been imposed by the previous grants of the original owner of the soils of the rivers and subject to the constitutional right of the United States Supreme Court to settle the construction of the congressional grants of land bounded by such navigable waters.

The grant to John M. Shively by the United States was *in presenti* under the Oregon donation land law, in September, 1850, and his title was perfect in 1854, by which grant his land was bounded by the Columbia, a tidal navigable river, years prior to the accrual of the State's title to the tide lands.

The grant of land "bounded by the Columbia river" was a grant of the greatest benefits derivable from having access to a navigable river and was, on familiar principles of law, a grant of right of way ("access," says Blackstone, 2 Comm., 26) over the tide land to its navigable waters for all beneficial uses.

"A right of way (2 Bl. Com. star page 36) may also arise by act and operation of law, for if a man grants me a piece of ground in the middle of his field he at the same time tacitly and impliedly gives me a way to come at it, and I may cross his land for that purpose without trespass; for *when the law doth give anything to one* it giveth impliedly *whatever is necessary for enjoying the same.*"

The value of the river as a boundary consists in getting to its navigable parts for all purposes of commerce and navigation. In the eloquent but homely language of the old Astoria pioneer, "Shively's pole, wrapped with a copy of the old donation law, will knock the persimmon." This brings the argument to the third great case.

Third—Yates vs. Milwaukee.

[10 Wall. 497, Dec. 7, 1870.]

Appeal from Circuit Court United States District of Wisconsin.

Suit to Enjoin City from Removing Plaintiff's Wharf.

STATEMENT OF FACTS.

Yates owned a lot in Milwaukee "bounded by the Milwaukee river." He constructed a wharf out to the navigable waters, 190 feet below high-water mark. In 1854 the Wisconsin legislature authorized Milwaukee to establish, by ordinance, dock and wharf lines, to restrain encroachments, and to cause the river to be dredged. In 1864 a city ordinance declared the wharf an obstruction to navigation and a man was hired to abate it. There was no evidence that it was in fact a nuisance. Yates sued to restrain the city and its man.

The Court's Rulings.

On appeal the United States Supreme Court, Miller, J., held:

(1.) Plaintiff's title was limited to the margin of the stream, under the United States patent "meandering" the river according to Railroad Co. *v.* Schurmeir, 7 Wall., 272, though the Wisconsin supreme court had held it went to the centre of the river.

(2.) But in either event, his land being bounded by a navigable river, he was "entitled to the rights of a riparian proprietor, among which were access to the navigable parts

of the river from the front part of his lot, the right to make a wharf or pier for his own or public use subject to general rules and regulations protecting the rights of the public whatever those may be."

The court cites Dutton *v.* Strong, 1 Black, 25, and Railroad Company *v.* Schurmeir.

(3.) This *right* is valuable property of which its owner can only be deprived, in accordance with public law, for the public good and *upon due compensation.*

(4.) The city could not destroy it by an ordinance, and could only remove or change the wharf so far as may be necessary in the actual improvement of the navigability of the river and upon due compensation made.

(5.) Where the town plat represented the premises in dispute as a portion of the Milwaukee river, the premises did not become thereby a highway by water because such an inference was contrary to the common law of the country. The "*public highway*" was only at the navigable waters.

These propositions were directly involved in the case. They are clear cut and unmistakable, by one of the clearest headed judges of the court upon full jurisdiction on the question of a right claimed under the United States laws and by the court of last resort in America. They make it a great leading case on riparian rights. It has been repeatedly affirmed and never questioned. It stands alongside of Lyon *vs.* The Fishmonger Co. as a light to the English speaking world.

Subordinate Cases to Preceding.

Dutton *v.* Strong, 1 Black, 25, writ of error to district court of the United States for Wisconsin, Dec. T., 1861. Trespass on the case.

Dutton owned a private pier at Racine, on Lake Michigan, extending into the lake several hundred feet. Strong's ship in a gale fastened to the pier. Dutton cut the hawser, as it threatened to destroy the pier. The ship sank, and Strong sued for damages on the ground that the pier was an obstruction to navigation as a matter of law. The right to erect the wharf out to the navigable waters was distinctly in issue and decided in favor of the right.

Railroad Co. *vs.* Schurmeir, 7 Wall., 272. Error to the supreme court of Minnesota, Dec., 1868. Suit to enjoin.

United States patent, issued 1848, for a fractional lot in St. Paul on the Mississippi river, meandering on the river but not taking in the reef or sand bar in front that was covered at high water, exposed to view at medium water, but not surrounded at very low water by a flow. It was not noticed in field-notes or plat and was outside of the meander. Roberts bought the lot and platted the reef and slough and sold to Schurmeir with a "landing" next the river.

In 1856, after it had all been filled in and graded, the space of the former reef was surveyed and platted by a Government surveyor as Island No. 11. The railroad company claimed it under a congressional grant. It was held (1) that the meanders of the river bounded the lot by the river; (2) that the bank owner's title stopped at the margin by the acts of Congress, but *with riparian rights to the navigable waters.*

The United States Supreme Court has repeatedly held that in the United States there is no distinction as to any rights between navigable waters, with reference to their being tidal or non-tidal.

The Thomas Jefferson, 10 Wheat., 428.

Gould on Waters, sec. 66, note 3, citing all the cases.

Nor as to the ownership by the State of the bed of the river, which fact existed in Yates *vs.* Milwaukee, 10 Wall., 492.

Several cases in the United States Supreme Court have been more or less relied on by the advocates of State sovereignty in the beds of navigable waters, but they plainly fail to support the doctrine of absolute State control over the tide lands *and also over the riparian rights*, as a brief analysis will show.

Barney *vs.* Keokuk, 94 U. S., 324, involved but a single question, A town plat dedicated a street on the Mississippi river bank and showed the waters adjoining. It was held that while the accretion belonged to the owner of the bank, yet the title was subject to the public easement of the street, which, by a construction of the plat, was held to have been bounded by the navigable waters. There was a question left undecided as to whether the United States survey went below the margin of the river. This gave occasion, however, to some careless *obiter* on the "sovereignty" doctrine as to the tide land, but not as to riparian rights. "It [meaning the tide land] properly belonged to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its surveys and grants

beyond the limits of high water." This territory was in the Louisiana purchase.

In the previous case of Weber *vs.* Harbor Commissioners, 18 Wall., 57, *where there was no question of the bank owner's riparian right nor of the title to the soil under the tide waters,* Justice Field said *obiter:* "Although the title to the soil under the tide waters of the bay (of San Francisco) was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State [as a matter of policy and as a voluntary trust.] Upon the admission of California into the Union upon an equal footing with the original States, absolute property in and dominion and sovereignty *over* all soils under the tide waters within her limits passed to the State." Yes, as a derivative title. But it will be noticed that which was contracted away by the United States in Mission Creek did not pass. It will be observed that Justice Bradley's later *obiter* in Barney *vs.* Keokuk treated the question as still open. (See Gould on Water, § 40, n. 6.)

It will also be observed that the case of Knight *vs.* Land Association effectually explodes that *obiter,* if meant for more than a derivative title.

McCready *vs.* Virginia, 94 United States, 391, decided simply that Virginia, as successor to the King, owned the bed of all tide waters, and as successor to King and Parliament owned the waters thereof subject to the Federal right as to commerce and navigation; that the latter was a right in trust for the whole people of the whole State of Virginia, and gave them title to the fish running in the water, and that this right is not "a privilege or immunity" belonging

to every citizen of the United States, but, with regard to the fish and oysters, is a *property right like the public title of a State to its uplands.* This is a case in our favor, sustaining our construction of Pollard's Lessee. It involved no question of the nature of the title of the United States, and only reaffirmed the undisputed doctrines of the common law.

ROAD BOUNDARIES.

The exclusive right of access exists, whether the adjacent owner has the fee to the center of the road or street or not. Where a person owns at the same time both an easement in a public road or street and the adjacent land, and grants that land as bounded on the street or road, this grant gives the grantee the exclusive right of access that cannot be taken away by the owner of the fee of the road, whether it is the State or the grantor.

38 Mich., 71, per Cooley, J., citing 10 Barb., 382; 8 Dana (Ky.), 294; 9 Ind., 38, 467; 68 Ills., 394.

This is a familiar and settled doctrine of law that needs not to be supported by cases. So the title to riparian rights in navigable waters exists without reference to who owns the river-bed; nor does it matter whether the waters are fresh or salt.

Gould on Waters, § 148, § 149, § 125, § 155.

So, by the most perfect analogy, where the United States owned an easement under the United States Constitution for all purposes of national commerce and navigation in a naviga-

ble river, tidal or fresh, which it had by statute previously established as a "public highway," and at the same time owned land that abutted upon such public highway, its grant of that land as bounded on that river gives the grantee the exclusive right of access in its front to its navigable waters for all purposes of commerce and navigation without regard to who owns the bed of this "public highway."

If at the time of its grant it also owned the bed of the highway but reserved to itself the title to its bed, this would only make the grant of the exclusive right of access more plain, but not more effectual. Its grantee's title would be subject to this easement. It has this easement by the United States Constitution.

Art. I, sec. 8; art. III, sec. 1.

It has declared these navigable rivers public highways.

U. S. Rev. Statutes, § 2476; act May 18, 1796.

In case of the original States, where the United States has this easement in the navigable waters it had not the original title to the adjacent land. Hence whether the easement was granted by the State patent was a matter of State decision.

But in the case above named, where it held both rights and made its grant of an easement in a National Highway over which the State has no control, as such, except by permission of the United States, it is simply absurd to say that the United States would leave this great right to the tender mercies of a State court interested to grab this property. The proposition has only to be stated to be refuted. It also demonstrates that the question of riparian rights under

a United States patent in such a case is purely a Federal question.

While the power and jurisdiction of the State over the State public roads is exclusive and extensive and its rules of decision controlling, yet its power and jurisdiction over these National Highways is purely permissive and entirely ceases when Congress acts.

Gilman *vs.* Philadelphia, 3 Wall., 713.
Wilson *vs.* Blackbird Creek Marsh Co., 2 Pet., 245.
Escanaba Co. *vs.* Chicago, 107 U. S., 678.
Trans. Co. *vs.* Parkersburg, 107 U. S., 691, 701.
Welton *vs.* Missouri, 91 U. S., 275.
South Carolina *vs.* Georgia, 93 U. S., 4.
Miller on the Constitution, pp. 457–'8.
Railway Co. *vs.* Renwick, 102 U. S.

The doctrine of this subheading is not only undeniable, but is most far reaching. It settles (1) the *power* of the United States to grant the easement, (2) its intention to grant it, and (3) its exclusive right and national duty to construe that grant, and not leave it to the uncertain notions of an inferior judiciary interested to destroy the easement.

A FEDERAL QUESTION.

It is claimed that the question whether the patent of the United States for lands bounding on navigable rivers grants riparian rights of wharfage and exclusive access is not a Federal question, but is a municipal question to be settled by the State law, and the decision of its supreme court upon that law is final.

This claim is unsound and based on a misconstruction of principles announced in cases where it was not in issue.

There is no doubt the construction of the United States patent for lands is to be governed by some body of municipal law, for the United States has not any municipal law. That body of municipal law is the one that is supposed to have entered into the contract. Usually the common law governs this court in construing the intention of the grantor. But the United States Supreme Court is not bound to accept the construction of that law by the local courts, nor their declaration of what is the State law in such cases. Neither could that law prevail against the plain intention of the grantor. Nor could a State court or a State legislature change or repudiate a plain grant of the United States of a wharfage right to a bank ownre, if the United States had the power to grant. The proposition is preposterous. It begs the question.

The United States Supreme Court first inquires what was intended to be granted by a patent of the United States. This question is always settled by the courts of the United States according to some body of general municipal law; not according to a legislative declaration; not according to the interpretation of that general law by a State court, unless established in all the State courts of the Union as indicated in Packer *vs.* Bird, 137 U. S., 661. Even then it is only *adopted* by the United States court as a wise guide to its own construction of its own grant. It has construed its grants of lands meandered on navigable waters to be confined, so far as the dry legal title to the soil is concerned, to the ordinary high tide line. It has also construed its public land laws to the effect that this *legal* title to the bed of navigable waters is transferred to the State upon its admission or by force of the policy of the Government to

meander those rivers. Exactly where the legal title is in territorial days is not settled. At any rate it has construed that it is not salable land, but held by United States to be passed to the State upon its admission. Having so held, it is, of course, to be governed by State legislation and State decision as to whether the State keeps that legal title or resigns it to the bank owner. It has also applied the same doctrine to an unnavigable lake that was meandered, though by mistake, as being "navigable." It is difficult to see what provision of the land laws or clause in the act of admission carries the title to such a lake out of the United States Government into the State. But this court has so declared it and that settles it, and settles also that it belongs to the State to do with it what it wills.

It has also, as we think, construed its grants of lands meandered on navigable waters to be confined, as to legal title to the soil, to ordinary high tide, and yet as giving to the bank owner the riparian rights of accretion and exclusive access to its "public highways," declared to be such since, 1796. It has never held that these important rights are left to State legislation or State decision. There are no "riparian rights" in the waters of an unnavigable lake which was not a "public highway," and no such question could arise in determining who owned that lake, the title to which had been passed to the State.

This is the plain effect of Hardin *vs.* Jordan, 140 U. S. 371. It does not at all touch the doctrine that the United States would leave it to a State wherein to declare the monstrous doctrine that the United States patents for lands bounded on the "public highways" of the United States did not bound on those highways, but the State was at liberty by

legislation, judicial or otherwise, to fence the United States grantee off from that highway. What an idiot Uncle Sam would be to serenely resign, without law or reason, to a State what would be a loss to the public lands of hundreds of millions of dollars in value by being cut off from these great highways!! And what State would hesitate in these degenerate days to appropriate that much of their uncle's revenues? Ambiguous remarks in a contest over a goose pond cannot settle one of the most important questions of the age, affecting vast millions of property rights in a great empire. The language of the court as well as its action in the case shows no purpose to resign this important prerogative. It may be its purpose was (as indicated) only to take the body of municipal State law as a guide where it could.

On page 384 the court say the grants of the Government are to be construed "according to the law of the State in which the lands lie;" yet it repudiated the construction of that law as declared by the supreme court of Illinois. The high-land grantee claimed his patent carried his legal title to the center of the lake. The State supreme court denied that right under the patent. Hence it was a Federal question and came up on writ of error. This court held the public land laws limited the legal title to the meander. Unless there is some confusion of expression of the ideas of the Court in the opinion as delivered by Justice Bradley as to the exact principle decided, the Court could (on concurring with the State court in its construction of the United States patent) only dismiss the writ or affirm the State court; yet it reversed the State supreme court and ordered a judgment for the bank owner on the ground that the United States Supreme Court and not the State court had a right to declare what the *lex loci contractu* was.

If that was the intention of the decision it may be said the municipal law of Oregon Territory in 1854 was in favor of the rights of riparian proprietors on all navigable rivers. It is also now the law of the State of Oregon as to fresh-water navigable rivers (Minto *vs.* Delaney, 7 Or., 337; Moore *vs.* Willamette T. &. L. Co., 7 Or., 355), and also as to tide-water streams, by actual decision as to accretions. (Pearcy *vs.* Bybee, 20 Oregon, 385.)

That municipal law is declared otherwise, in the case at bar, on the untenable ground that the State being the absolute owner of all rights below ordinary high tide in tidal navigable waters the bank owner has no riparian rights and the State can sell in front of him to private uses and fence him off from the great "public highway" of the Columbia, declared by general law and by act of admission to be forever free as a "public highway"—a most monstrous doctrine and one this court will not recognize as the law of the State (entering into the construction of the United States patent) so far as it affects the vital rights of a grantee of the United States. (See Packer *vs.* Bird, 137 U. S., 661.)

This claim of local question is not based on any constitutional principle nor any specific decision. It seems to rest mostly on the case

HARDIN vs. JORDAN, REVIEWED

(140 U. S., 382).

This case was one where a patent of the United States issued for land "meandered" upon an unnavigable lake. The question on writ of error was whether the grantee by virtue of his patent took down to the meander or went to

the center of the lake. The decision was that *under the United States patent* he took only to the meander. But under the laws of the United States the title to the lake went, by analogy to the beds of real navigable waters, to the State; and under the laws of the State (which owned the lake and could hence decide) the bank owner took the title to the center of the lake. Yet the United States court set aside the State decision and decided for itself what the State law was. This seeming anomaly is only explainable by the theory that the true principle was that while the municipal law in some cases entered into the construction of a Federal grant the Federal courts themselves would in such cases decide what that law was.

It certainly furnishes no ground for the claim that it held the principle that the State rules of decision or the State courts could finally settle the construction of the patent to any property except that which the State once owned and had granted. It did not pretend to remit to the States the settlement of the question of riparian rights already settled in Yates *vs.* Milwaukee.

A review of the cases cited by Justice Bradley will plainly prove this.

St. Louis *vs.* Rutz, 138 U. S., 242. The land bounded on the Mississippi in Illinois. The question was whether the bank owner's title to the soil extended to center of the river, so as to take an island that grew up on east side.

The court held, as in numerous other cases, that the State on admission to the Union took the legal title to the bed of its navigable rivers and had a right for that reason to finally settle the question, which it had settled in favor of bank owner. They say the question is one "in regard to a rule

of property which is governed by the local law of Illinois." Nothing was involved as to riparian rights. It cites Barney *vs.* Keokuk, St. Louis *vs.* Myers, and Packer *vs.* Bird. It says "in Barney *vs.* Keokuk it is said that if the States choose to resign to the riparian [thus recognizing that right in the bank owner] proprietor rights which properly belong to them in their sovereign capacity [soils of these rivers, not the bank owner's wharfage right] it is not for others to raise objections."

Manchester *vs.* Massachusetts, 139 U. S., 240 was simply a question of the right of Massachusetts to dispose of fisheries on its seashore. It is not a riparian right at all. It is the same question as in McCready *vs.* Virginia. It is in harmony with our positions. No riparian question arose at all in the case.

Packer *vs.* Bird, 137 U. S., 661. Error to supreme court of California. Jan'y 14, 1891. Decree for defendant. Affirmed. Action for an island of 80 acres in Sacramento river, Colusa county, California. Sacramento was a navigable river at that point. Plaintiff's United States patent issued December, 1857, for the ranch of Larkin's children. The decree of the land court settling the Mexican grant described the land as commencing "*at a point on the Sacramento river* * * * and running southerly *on the margin of the river* to a point five miles south of the place of beginning," &c. The survey which was incorporated in the patent described the eastern boundary line as commencing at oak post "on the right bank of the Sacramento river," and thence "traversing the right bank of the Sacramento river down stream," &c. The court found that at that point the Sacramento river divided into two channels in 1853–'8, making an island, and both channels were then well defined, ruling out evidence

to show the channel between plaintiff's land and the island was a slough. The plat showed the land on the east bank of the east channel. There was no question of wharfage or riparian rights which would probably have been excluded as not calling for a "river boundary."

It was simply a question whether his title to the bed of the river extended to the center of the main stream across the east channel. In conformity with the doctrine that the title to the bed of the river belonged to the State, its decision was adopted that it stopped at high-water line, especially as the language of the patent and the plat indicated an intention to stop at the *margin* of that east channel.

Mr. Justice Field uses this language: "The courts of the United States will construe the grants of the General Government without reference to the rules of construction adopted by the States for their grants, but whatever incidents or rights attach to the ownership of property [referring here doubtless to the legal title to river beds] conveyed by the Government will be determined by the States, *subject* to the condition that their rules do not *impair the efficiency of the grants* or the *use and enjoyment of the property by the grantee*," adding that rule as to legal title below high-water mark. "How far," he continues, "will such grants be deemed to extend into the water, if at all? *From the* conflicting decisions of the State courts it is evident that there is no such general law on the subject as will be deemed to control their construction."

The general effect of the decision is, in accordance with California law as to the beds of navigable rivers and of the true construction of the act, to hold that *this title* does not include the island, notwithstanding the case of Railroad

Co. *vs.* Schurmeier, where the patent and plat clearly called for the main river.

St. Louis *vs.* Myers, 113 U. S., 567. The Mississippi river, remarks the Court, as a common highway, "has been referred to in the argument here, but the rights of the riparian owners are nowhere mentioned in that act. *They* are left to be settled according to the principles of State law." Not whether he has them, but the damages for their infringement which he had already recovered from St. Louis; and the judgment was affirmed.

There was no question as to whether the State or Federal courts should finally settle the contention whether his United States patent gave him those rights.

In Barney *vs.* Keokuk, 94 U. S., 324, error to United States circuit court for Iowa, ejectment against the city and railroad companies for possession of certain made land between a street and the river, the owner platted the land; and the space between lots 5 and 6 and the river, about 100 feet wide, was called Water street. The city filled in the Mississippi in front of Water street. The court decided that the city had a right to widen and improve Water street, on the ground that the plat gave a "river boundary" to that street. It thus gave the riparian right to the city, and it was authorized under its charter (so far as the State's servient legal title was concerned) to widen and improve Water street to any extent on the river side.

No question arose as to the State's ownership of the riparian right, nor of its power to affirm or deny it. It was conceded to belong to the bank owner and his assigns.

The question whether the bank owner's title to the bed of the river extended below high tide was considered, but

not decided. It was held, in any event, to be charged with the easement.

The doctrine clearly established in later cases (and to which we assent)—that the United States has ceded the beds of the navigable rivers to the State, and that the State should settle whether it yielded that legal title to the bank owner—was broadly indicated, but not decided. "The cases in which this Court has seemed to hold a contrary view depended, *as most cases* must depend, on the local *laws* of the States in which the lands are situated. In Iowa, as before stated, the more correct rule seems to have been adopted on the subject." The Court spoke only of that legal title to the soils of the rivers when they said: "If they (the States) choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity it is not for others to raise objections." Justice Bradley said, further: "It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water." The phrase "inherent" sovereignty on the one hand and the intimation of *power* in the United States to dispose of the tide land on the other were mere expressions of the judge and not judicial decision, for all that, as to the nature of the title of the State, was expressly left open. But nothing whatever was decided or in issue as to the State's power to finally determine what "riparian rights" are conferred by a patent of the United States.

Smith *vs.* Maryland, 18 How., 71, and McCready *vs.* Virginia, 94 U. S., 391, were cases in two of the original thirteen States, which we concede, as the original grantors, have

the right to construe their own patents as to riparian rights; but no such question arose in either of those cases. They simply related to the undoubted title of all the States, old and new, to the fish in their waters. So with Pen *vs.* Jersey Co., 15 How., 426.

It is therefore apparent that none of the cases cited in Hardin *vs.* Jordan sustain the doctrine that the question o riparian ownership under a United States patent for land bounded by navigable waters is left by the United States Supreme Court to the decision of the local courts. The sole doctrine is that the United States has ceded to the States the legal title to the beds of all navigable rivers, and it is therefore, as a matter of course, left to the States to settle, as a matter of State policy, whether they will resign their own title to the bank owner or keep it themselves. The only further question decided in Hardin *vs.* Jordan was that where the United States land department meandered an unnavigable lake the bank owner's legal title stopped at its margin and the waste land went (as in case of the soils of really navigable waters) to the State, which could, as in the case of such beds of rivers, decide who was the owner. As in all the other cases cited, no question of riparian rights arose.

It is true Justice Bradley, speaking *arguendo* of the beds of navigable rivers, says it "*cannot be retained* or granted out by the United States," but of course there was nothing in a goose-pond case to call for such a statement about a question affecting gigantic interests. It was not a "decision."

RESERVATION BY PLAT.

A plat referred to in a deed becomes part of a deed. Where parcels of tide flats are sold according to a plat as

bounded upon a street or other boundary than the navigable waters of the river, the grantor reserves all of his tide flats except the lots described in like manner as in platting of uplands.

Potomac Flats Case, 109 U. S., —.
Pollard's Lessee *vs.* Files, 2 How., 607.
Richardson *vs.* Prentiss, 48 Mich., 88.
8 West (Mich.), 770.
Birmingham *vs.* Anderson, 48 Pa. St., 253.
Shorer *vs.* Freeman, 6 Mass., 435.
8 Greenl., 85.
Codman *vs.* Wilson, 10 Mass., 146.
14 Mass., 149; 17 Mass., 289.
12 Johns., 447.
Turner *vs.* Watson (Cooley), 26 Mich., 517.
Kenyon *vs.* Knapp., 2 Wash., 394.
12 Or., 359.
17 Or., 515.

Prior to Pollard's Lessee vs. Hagan (*A. D.* 1844) *the universal American and English doctrine as to all tidal navigable rivers was that the bank owner had vested riparian rights.*

Angell on Water-courses, *passim.*
Clement *vs.* Burns, 43 N. H., 609, and cases cited.
Stevens *vs.* Patterson, 34 N. J. (law), 534, and cases cited (per Chancellor Walworth).

With the misconstruction of Pollard *vs.* Hagan that doctrine became clouded by reason of a confusion of ideas be-

tween the title to the soils of navigable rivers and the riparian rights.

Gould *vs.* Hudson River R. R., 6 N. Y., 522, and
Stevens *vs.* Paterson, 34 N. J. (law), 532,

were leading cases. The former has been reversed (Rumsey *vs.* N. Y. & N. E. R. R. Co., 25 N. W. Reporter, 1080) and the latter abandoned by legislative aid.

Now the accepted doctrine of the best English and American courts is, as at first, as first above stated.

Gould on Waters, § 148.

The great case of Lyon *vs.* Fishmonger & Co., in England and Yates *vs.* Milwaukee, in America, have practically settled the doctrine in all common law countries. They give the law to the American and English world.

The numerous cases cited by the defendant in error in Yesler *vs.* Harbor Line Commissioners are some of the expiring throes of an exploded theory, and none even of those cited go to the extreme of the two cases from Oregon and Washington—Eisenback *vs.* Hatfield and Bowlby *vs.* Shively.

Following is a partial list of authorities sustaining the doctrine of riparian rights:

3 Washburne, R. P. (5th ed.), 445.
Gould on Waters (2d ed.), §§ 148–154.
Lewis on Eminent Domain, § 77 to 83.

Counsel for the defendant in error in Yesler's case quotes from Lewis on Eminent Domain in § 85. But in § 75 he says: "On the other hand, there are cases which hold that the riparian owners, upon waters the bed of which belongs

to the public, have valuable rights appurtenant to their estates, of which they cannot be deprived without compensation. *This seems to be the better and sounder rule.* The opposite conclusion has been reached by a narrow and technical course of reasoning, based upon the fact that the title to the soil is in the State or the public. It is assumed that this title gives the State the same absolute and exclusive control over the waters and their bed as an individual possesses over his private property."

Dillon's Mun. Corp. (4th ed.), § 106.
6 Am. & Eng. Encyclop. of Law, p. 558.
Cooley's Const. Lim. (5th ed.), p. 675, note 1.
Lincoln *vs.* Davis, 53 Mich., 375.
Delaplaine *vs.* Railway Co, 42 Wis., 214.
Brisbine *vs.* Railroad Co., 23 Minn., 114.
Meyers *vs.* St. Louis, 82 Mo., 367.
Thurman *vs.* Morrison, 14 B. Mon., 296.
Hichock *vs.* Hine, 23 Ohio St., 523.
Organ *vs.* Railroad Co., 51 Ark., 235.
Shirley *vs.* Bishop, 67 Cal., 543.
Clement *vs.* Burns, 43 N. H., 609.
Tinicum Fishing Co. *vs.* Carter, 61 Penn. St., 21.
Clark *vs.* Peckham, 10 R. I., 35.
B. & O. Railroad Co. *vs.* Chase, 43 Md., 23.
Bond *vs.* Wood, 107 N. C., 139.
State *vs.* Sargent, 45 Conn., 358.

Some Obiter Dicta.

Sergeant Merewether, in a great speech about the King's title to the beds of rivers, once said:

"I am not insensible to the difficulty I have to meet in discussing the proposition, because I am fain to admit that it has been asserted again and again; nor could I fail to allow that learned judges upon the Bench have asserted it, but in all instances merely as *obiter dicta*, and I will venture to say that on no occasion has that proposition been supported by any legal decision."

The *obiter*, however, on this subject have been mostly upon the doctrine of the "inherent sovereignty" and "absolute ownership" of the State in the soils of navigable rivers. These *obiter* have been sought to be used as equivalent to an assertion of absolute State control and ownership of the bank owner's riparian right. The question, however, of "inherent" sovereignty seems to disappear in face of the plain principles set out under title "Road Boundaries."

Following are some of these *dicta:*

County of St. Clair *vs.* Lovingston, 23 Wall., 63: "And new States have *the same rights* of *sovereignty* and *jurisdiction* over the subject [tide lands] as the original States, which original States had not ceded the beds of navigable rivers."

This was not hostile to the riparian right, for the same case declared the riparian right of accretion.

THE BRIEF OF DEFENDANT IN ERROR in Yesler's case is not only a striking instance of perverted doctrine, but it collects all of the *obiter* of the judges of this court in its discussion of its proposition.

" *The general riparian or littoral right of access and wharfage* are not based upon local statutes, but they *are, nevertheless, questions purely of* LOCAL *law, and have uniformly been so treated by this Court.*"

A consideration of these citations, therefore, will serve the double purpose of pointing out the obiter on the sovereign title to the tide land, and also of answering this perversion of the doctrine on that subject to precedents upon the question of what court shall finally settle the construction of United States patents to high-bank owners.

That brief cites as follows:

Hardin vs. *Jordan* (140 *U. S.*, 371), already considered.

It quotes: " It depends upon the law of each State to what waters and to what extent this prerogative [the *tide*-land title only] of the State over the lands under water shall be exercised." In the majority opinion this is stated to be " one of the latest expressions of this doctrine." The brief perverts the minority opinion to the same purpose. " Beyond all dispute the settled law of this Court, *established by repeated decisions* [only as to the *legal title* to soils of navigable rivers], is that the question how far the title [to the tide land, not to 'riparian rights' in the face of Yates *vs.* Milwaukee, Dutton *vs.* Strong, etc.] of a riparian owner extends is *one of local* law."

In *Mumford* vs. *Wardell*, 6 *Wall.*, 436, the clause relied on is that "the new States have the same rights, sovereignty, and jurisdiction *in that behalf* as the original States" in "the *shores* of navigable waters and the soils under the same."

This case was simply a writ of error from a United States circuit court for errors at the jury trial. The errors assigned

were: (1) practice as to a special verdict, (2) as to the *prima facie* character of a deed at a sale by a city officer, and (3) as to what was meant by the word "book" in a State statute. The plaintiff claimed title to a water lot under a State grant which excepted certain sales by the city. The question was whether the city deeds were good under that exception. The court held they were and plaintiff was defeated. No question arose as to how the city obtained its title.

Pollard *vs.* Hagan, 3 How., 230 is already discussed.

In *Huse vs. Glover*, 119 *U. S.*, 546, the clause stood upon is, "*On her admission* she at once became entitled to and possessed of all the rights of *dominion* and *sovereignty* which belonged to the original States."

It had nothing to do with "riparian rights" nor the bank owner's claim in any way. It was simply a question of imposing tolls for locks constructed by the State in the channel. It is a conceded power of the State until superseded by Congress.

In Weber *vs.* Harbor Commissioners, 18 Wall., 65, the clause is "upon the admission of California * * * *absolute property* in and dominion and sovereignty over all *soils* under the tide waters within her limits passed to the State." Manifestly Justice Field only referred to the *legal* title and governmental control, for he adds (p. 65): "But in this case no inquiry as to the rights of a riparian proprietor by either the common law or local usage or regulation is needed. The complainant is not *the proprietor of any land bordering on the shore* of the sea in any proper sense of the term." The court expressly declares (p. 65) it recognized the

correctness of the doctrines of Yates *vs.* Milwaukee, which expressly held that the right was only subject to the issue whether the wharf was a nuisance to public navigation. Anything of ambiguous nature, therefore, in the language of that opinion upon the subject of "riparian rights" was not "needed," as Justice Field remarks.

In *Withers vs.* Buckley, 20 How., 84, 93, the clause relied upon is that "Congress could exact of a *new State* the surrender of no attribute *inherent in her character as a sovereign*, independent, State and guaranteed by the *very nature of the Federal compact* [which we have seen the *legal title* to the beds of tidal rivers is not]. Obviously * * * among the incidents of that equality is the right to make improvements in the rivers, water-courses, and highways situated within the State" [which is conceded even to digging out the channel to the high bank, but not separating that high bank from its exclusive access to the channel].

That brief also cites McCready *vs.* Virginia, Packer *vs.* Bird, Barney *vs.* Keokuk, and others where the *obiter* are even less capable of being perverted into the doctrine of the brief.

It then concluded that "the foregoing authorities would seem to settle the law in this respect so conclusively that any further citation of authorities would seem to be superfluous" and proceeds to consider the doctrine at common law.

It is manifest that so vital a principle as the exclusive right of the States to determine the value of grants of the United States could not be held to be settled by the cases so confidently relied upon. In fact it is manifest they are all consistent with the common sense right of the United States

to construe its own patents in respect to riparian rights which it has the undoubted power to grant with its high land bounded on the "National highways."

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Att'ys for Pl'ff in Error.

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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 1132.

CHARLES W. SHIVELY, PLAINTIFF IN ERROR,

vs

JOHN Q. A. BOWLBY AND W. W. PARKER,
DEFENDANTS IN ERROR.

Writ of Error to the Supreme Court of the State of Oregon.

Brief for Defendants in Error.

J. N. DOLPH,
Attorney for Defendants in Error.

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STATEMENT OF THE CASE.

Attorneys for plaintiff in error have sought to create the impression that the questions involved in this case are similar to the questions involved in the case of *The State of Washington, on the relation of Henry L. Yesler vs. William F. Prosser, et al.*, now under consideration by this court, upon writ of error to the Supreme Court of the State of Washington. It will be found that the facts in the two cases are not similar and that the decision of

this case does not necessarily involve the consideration of any question raised in the Yesler case.

This suit was brought in the Circuit Court of the State of Oregon for Clatsop county by the defendants in error, who were in possession of the premises, against the plaintiff in error to quiet title and remove a cloud from certain tide lands described in the complaint as follows: "all the tide lands on the west one-half of block 141, on all of blocks 126 and 127 and north thereof, west half of block 146 and north thereof between the lines of low and ordinary high tide on the Columbia River." (Record, folio 1, p. 1.)

Plaintiffs in their complaint alleged in substance that the tide lands in question had been conveyed to them by the State of Oregon more than ten years prior to filing the complaint, that they were situated within the corporate limits of the City of Astoria; that they, the plaintiffs, were the owners of the wharfing rights, privileges and appurtenances in front thereof to the ship channel of the Columbia river, and were maintaining and operating a wharf in front of block 127, at which ocean and river craft were wont to receive and discharge freight.

That, pretending to act under an act of the legislature of the State of Oregon entitled "An act to be entitled an act to authorize the City of Astoria to erect a sea wall and to grade the streets and construct sewers in connection therewith and to issue sea-wall bonds, and for other purposes relating thereto, and passed by the House February 4, 1891, and passed by the Senate February 10, 1891," and to be entitled to so act, defendants did, on the 7th day of April, 1891, execute and cause to be certified a written instrument of dedication, a copy of which is set forth in the complaint, and caused the same to be re-

corded in the records of deeds of said county. That such instrument is void but casts a cloud upon plaintiff's title. (Record, folios 1 and 2, pp. 1 and 2.)

This suit was brought under §504 of Hill's Code of Oregon which is as follows:

"§504. Any person in possession by himself or his tenant of real property may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest."

The defendant, C. W. Shively, answered, admitting plaintiffs' possession, but denying their title to the tide land on any of the blocks except the west half of block 146, and pleaded as a counter-claim, in substance, that John W. Shively and wife were in 1854 owners in fee of a donation land claim, embracing a large portion of the present city of Astoria, and that by the patent issued to them in 1865 the said donation claim was bounded on the north by the Columbia River; that on the 29th day of May, 1854, the said Shively and wife laid out and caused to be recorded a plat of the original town of Astoria, and also an addition thereto known as "Shively's Addition," in which was embraced all the property in controversy; *that the land platted included not only the high land, but also the tide land and a portion of the bed of the Columbia River;* that each of the blocks was bounded by a street 60 feet in width, with the exception of the north tier; that a portion of the said blocks in the north tier, including said block 127, were bounded by a way 30 feet in width, but that the remainder of the blocks in the north tier, including block 146, were bounded by a street 60 feet in width; that block 141 is partly above

and partly below ordinary high tide, and that lying between block 141 and the main channel of the river are blocks 126 and 127; that north of block 127 is the 30-foot way already mentioned, and that between said way and the ship's channel of the Columbia River there is a distance of some eight hundred feet upon which no lots or blocks were laid out upon the plat; that lying south of block 141 is block 9, which is alleged to be entirely upon the high land and is separated from block 141 by a street; that block 4 is partly above and partly below ordinary high tide, and that north of and between it and the main channel is block 146, and that between block 146 and the main channel is a street 60 feet in width. It is further alleged that in February, 1860, John M. Shiveley and wife executed a deed to one James Welch for blocks 146, 126, and 127 as laid out and recorded on said plat, and that on the same day they conveyed to Nancy Welch block 9 by a similar description, and that by various conveyances the plaintiffs have succeeded to the said title of the said James and Nancy Welch to the said blocks, but that the plaintiffs have no other or further right or title to the property in controversy other than such as they may have derived from the deeds of the board of school land commisssioners; that on the 18th day of September, 1876, the State of Oregon conveyed to the plaintiffs by deed all the tide land in block 146, but that no deed has ever been executed to any one by the State for any tide land north of said block 146, and that on the same day the State conveyed by deed to the plaintiffs with the following description: "All the tide land lying between ordinary high tide and ordinary low tide, lying both on and in front of the east half of block 5, in the track known as Shively's Astoria, and including the tide land on the

east half of block 145, in said Shively's Astoria; also that parcel being all the land lying between ordinary high tide and ordinary low tide, both on and in front of block 9, in said Shiveley's Astoria, including all the tide land in block 141, in said Shiveley's Astoria, containing 4.63 acres, more or less."

It is also alleged that John M. Shiveley, having acquired his wife's interest and never having conveyed away the bank lots abutting and fronting on blocks 141 and 146, nor any rights north of blocks 127 and 146 except as inferable from the above-described conveyances, did, on December 15, 1890, convey to C. W. Shiveley all his rights in the property in controversy. (Record, folios 9 to 17, pp. 5 to 9.)

From the allegations and admissions in the pleadings and the legal inferences from the same the following propositions may be treated as established :

First. That the Donation Land Claim of John M. Shively and wife was bounded on the north by the Columbia River.

Second. That the donees platted portions of the same lying on the river and portions of the tide lands and river bed in front of the same as a town site.

Third. That on the 18th day of February, 1860, said John M. Shively and wife executed and delivered a deed to James Welch *without reservation* for blocks 146, 126 and 127, and on the same date executed and delivered a deed to Nancy Welch for block 9.

Fourth. That the defendants in error having purchased from James Welch or his grantees all the right he derived from Shively and wife to the west half of block 146, which is tide lands, as grantees of the original shore

owners, made due application to the State of Oregon for the purchase of the same as tide lands. And the same was awarded to them by the Board of School Land Commissioners, having authority to pass upon the application, either after a contest or after an opportunity for a contest by Shively, and a deed was issued by the State to them for the same September 18, 1876.

Fifth. That the defendants in error as owners of block 9, being the high land abutting upon the river, on the 18th day of September, 1876, applied to the Oregon Board of School Land Commissioners to purchase the tide lands *abutting and fronting* on block 9, and in due course of law received a deed from the State for "that parcel of land being all the land lying between ordinary high tide and ordinary low tide *both on and in front of block 9* in said Shively's Astoria *including all the tide land in block 141.*"

These descriptions clearly embrace all the tide land in controversy.

It will not be contended that the facts alleged in the answer were sufficient to impeach or to entitle the plaintiff in error to have the State deeds set aside. (See Shively *vs.* Parker, 20 Fed. Rep. 28.)

The accretions, if any, in front of the tracts conveyed to the defendants in error by the State by the well settled law of this country, belong to them, at all events they do not belong to the plaintiff in error.

Plaintiffs demurred to the answer of the defendant, except so much thereof as referred to the south one-third of lots 7, 8, and 9, in block 141, for the reason that the same did not state facts sufficient to constitute a defense. The portion of the answer which referred to the south third of lots 7, 8, and 9, in block 141, was an allegation, in sub-

stance, that such portion of those lots was not tide land (therefore not in controversy), so that the demurrer was in fact to the entire answer. (Record, folio 7, p. 4.)

The court sustained the demurrer, and thereafter, on motion of plaintiff, gave judgment of nonsuit. (Record, folio 19, p. 10.)

Upon appeal the Supreme Court of Oregon affirmed the decree of the Circuit Court, sustaining the demurrer to the answer and the motion for judgment of nonsuit. (Record, folio 26, p. 13.)

The record does not show that the demurrer to the answer was passed upon by the Circuit Court of Oregon. The fact is that the order of the court sustaining the demurrer was accidentally omitted from the transcript. The Supreme Court of the State, however, passed upon both the demurrer and the motion to dismiss. The question involved in both was the same and was whether the facts alleged in the answer constituted a counter claim *upon which a suit might have been maintained by the defendant against the plaintiffs.*

The following is from the decree of the Supreme Court:

"It is therefore further ordered and decreed that the demurrer to said answer be, and the same hereby is, sustained and said answer is dismissed; and the court, having fully considered respondents' motion to dismiss the suit without prejudice to their interests in the subject thereof, and being fully advised in relation thereto, finds that the respondents are entitled to such dismissal of their suit.

"It is therefore further ordered that the suit be, and the same hereby is, dismissed without prejudice to the interests or rights of said respondents." (Record, folio 26, p. 13.)

The questions for the consideration of the court are:

First. Whether this decision of the Supreme Court of Oregon involved the consideration of and decision upon a federal question, determined adversely to the plaintiff in error.

Second. Whether if a federal question was necessarily involved and decided it was correctly decided.

I.

THERE IS NO FEDERAL QUESTION INVOLVED IN THIS CAUSE AND THE WRIT OF ERROR SHOULD BE DISMISSED.

In the consideration of the demurrer to the answer and of the motion to dismiss by the Supreme Court of Oregon, there was no question involved that comes within the provisions of the Revised Statutes concerning writs of error to state courts. The validity of a statute of, or an authority exercised under the United States was not drawn in question; the validity of a statute of, or authority exercised, under any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States was not drawn in question; no title, right, privilege, or immunity was claimed under any treaty or statute of the United States.

"The validity of a statute is not drawn in question every time that a right claimed under such statute is controverted; nor is the validity of an authority drawn in question every time that an act done by such authority is disputed."

Fosters's Federal Practice, § 477.

Cook County *v.* Calumet & Chicago C. & D. Co. 138 U. S., 635, 653, 654.

The plaintiff in error, with much repetition, asserts that the question to be determined in this case is whether "*the patent of the United States for lands bordering on navigable rivers grants riparian rights of wharfage and exclusive access?*"

This is not the question. The question sought to be raised by plaintiff in error is whether a riparian owner upon an arm of the sea, because the Columbia River at Astoria is nothing less, has a paramount right as against a State to occupy and use for his own benefit the tide lands and the bed of the navigable waters in front of him?

The question would be the same if the title of the bank owner to the high land were derived from any other source than from the United States. It is a question to be determined alone by State law and the adjudications of State courts.

The riparian rights contended for by counsel for plaintiff in error would embrace the entire beneficial use of the tide lands and be wholly incompatible with the ownership of such lands by the State.

I find the proposition that the rights of access and wharfage claimed for the riparian owner in this case are questions purely of local law, and therefore that decisions concerning them do not involve Federal questions fully presented in the brief of the Attorney General of the State of Washington in the Yesler case, above referred to, and quote from it the following:

"The second and third classes of property asserted by relator, viz., the general riparian or littoral right of access and wharfage, are not based upon local statutes, *but they are nevertheless questions purely of local law*, and have uniformly been so treated by this court.

"One of the latest expressions of this doctrine is to be

found in the case of *Hardin vs. Jordan*, 140 U. S., 371, in which the court says:

"'The right of the state to regulate and control the shores of tide waters and the lands under them is the same as that which is exercised by the crown of England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and in Pennsylvania to all the permanent rivers of the state; *but it depends upon the law of each state to what waters and to what extent this prerogative of the state over the lands under the water shall be exercised.*'

"In that case the court sought simply to determine what was the law of Illinois, a question on which the court was not unanimous, Justices Brewer, Gray and Brown dissenting as to the law of Illinois. And Justice Brewer, in writing a dissenting opinion, uses the following language:

"'Beyond all dispute the settled law of this court, established by repeated decisions, is that the question how far the title of a riparian owner extends *in one of local law.* For a determination of that question, the statutes of the state and the decisions of the highest court furnish the best and the final authority.'

"In the case of *Mumford vs. Wardwell*, 6 Wall., 436, the court says:

"'The settled rule of law in this court is, that the shores of navigable waters and the soils under the same in the original states were not granted by the constitution to the United States, *but were reserved to the several states; and the new states since admitted have the same rights, sovereignty and jurirdiction in that behalf as the original states possess within their respective borders.*'

"And in *Pollard vs. Hagan*, 3 How., 230, the following language is used:

"To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters would be placing in their hands a weapon which might be wielded greatly to the injury of state

sovereignty and deprive the states of the power to exercise a numerous and important class of public powers.'

In *Huse vs. Glover*, 119 U. S., 546, the court uses this language, in speaking of the State of Illinois:

"'On her admission, she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the several states.'

"Again, in *Weber vs. Harbor Commissioners*, 18 Wall., 65, the same court says:

"Upon the admission of California into the Union upon equal footing with the original states, *absolute property in and dominion and sovereignty over* all soils under the tide waters within her limits passed to the state.'

"In *Withers vs. Buckley*, 20 How., 84, 93, the same court says:

"'Clearly, Congress could exact of a *new state* the surrender of no attribute inherent in her character as a sovereign, independent state or indispensable to her equality with her sister states, necessarily implied and guaranteed *by the very nature of the federal compact*. Obviously, and it may be said primarily, among the incidents of that equality is the right to make improvements in the rivers, water courses and highways situated within the state.'

Again, in *County of St. Clair vs. Livingston*, 23 Wall., 68, the court says:

"By the American Revolution the people of each state in their sovereign character acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the constitution of the United States, but were reserved to the states respectively; and *new states* have the same rights of sovereignty and jurisdiction over the subject as the original ones.'

"See also—

"*McCready vs. Virginia*, 94 U. S., 391.
"*Packer vs. Bird*, 137 U. S., 661.
"*Barney vs. Keokuk*, 94 U. S., 394.
"*Willson vs. Blackbird Creek Co.*, 2 Pet., 245.
"*Gilman vs. Philadelphia*, 3 Wall., 713.
"*Rundle vs. D. & R. Co.*, 14 How., 80, 93.
"*Hoboken vs. R. R. Co.*, 134 U. S., 656."

II.

BUT IF IT SHALL BE HELD THAT THE MOTION FOR JUDGMENT OF NONSUIT INVOLVED A FEDERAL QUESTION THE MOTION WAS PROPERLY ALLOWED BECAUSE THE OREGON STATUTE OF LIMITATIONS HAD RUN AGAINST THE COUNTERCLAIM PLEADED BY DEFENDANT AND IT WAS NOT THEREFORE ONE UPON WHICH A SUIT COULD BE MAINTAINED.

The allowance of the motion for judgment of nonsuit could have been based upon this ground done without considering the merits of the counter claim, and therefore without passing upon the alleged federal question.

The allowance of the demurrer to the answer of the defendant by the Circuit Court of Oregon did not affect the question of the right of the plaintiffs to take a nonsuit.

Plaintiffs were entitled to a judgment of nonsuit unless defendant had pleaded a counter claim upon which a suit *might have been maintained* by the defendant against the plaintiff.

The motion for a nonsuit therefore involved the determination by the Circuit Court of Oregon of the question whether defendant by his answer had pleaded a counter claim entitling him to affirmative relief against the plaintiff.

The Circuit Court held that such a counter claim had not been pleaded, and allowed the motion for a judgment of nonsuit, and on appeal the Supreme Court of Oregon affirmed the judgment.

The decision of the Supreme Court of Oregon upon this question, *a question of practice under the Oregon code*, is final and cannot be reviewed in this court unless its decision involved a federal question.

Section 246 of the Oregon code provides that—

"§ 246. A judgment of nonsuit may be given against the plaintiff, as provided in this title."

"1. On motion of the plaintiff, at any time before trial, unless a counter claim has been pleaded as a defense."

* * * * * * *

This provision is made applicable to suits in equity by § 402 of the Oregon code.

Section 393, Hill's Code, provides that—

"§ 393. The counter claim of the defendant shall be one upon which a suit might be *maintained* by the defendant against the plaintiff in the suit." * * *

The counter claim pleaded by the defendant was not one upon which *a suit might have been maintained* by him against the plaintiffs, because by it defendant substantially sought to set aside a deed of the State executed more than ten years prior to the commencement of the suit, or to have plaintiffs declared trustees of the lands conveyed by the deed for defendant's benefit.

By § 382 of the Oregon code it is provided as follows:

"* * * but no suit shall be maintained to set aside, cancel, annul, or otherwise affect a patent to lands issued by the United States *or this State*, or to compel any person claiming or holding under such patent to convey the lands described therein or any portion of them to the plaintiff in such suit, or to hold the same in trust for, or to the use and benefit of such plaintiff, or on account of any motion, thing, or transaction which was had, done, suffered, or transpired prior to the date of such patent, *unless such suit is commenced within ten years from the date of such patent.*"

III.

THE COUNTER CLAIM PLEADED BY THE DEFENDANT, PLAINTIFF IN ERROR, WAS NOT SUFFICIENT TO ENTITLE HIM TO RELIEF.

IT SHOWED THAT THE PLAINTIFFS HAD, UNDER THE PROVISIONS OF THE STATE LAW, REGULARLY ACQUIRED THE STATE'S TITLE TO THE TIDE LANDS IN QUESTION, AS THE GRANTEES OF SHIVELY AND WIFE, THE DONATION CLAIMANTS, OF THE LAND UPON THE SHORE IN THE ONE CASE AND OF THE TIDE LANDS IN THE OTHER CASE, AND THAT THE PLAINTIFF IN ERROR HAD NO TITLE OR INTEREST THEREIN.

Tide lands in Oregon belong to the State by virtue of its sovereignty.

Hinman *vs.* Warren, 6 Or. 411.
Parker *vs.* Taylor, 7 Or. 466, 447.
Parker *vs.* Rogers, 8 Or. 183.
Wilson *vs.* Welch, 12 Or. 353.
McCann *vs.* Oregon R. Co., 13 Or. 462.
Eisenbach *vs.* Halfield, 2 Wash. 236.
Pierce *vs.* Kenedy, 2 Wash. 324.
Bissell *vs.* Henshaw, 1 Sawyer 579.
Weber *vs.* Harbor Commissioners, 18 Wallace 65.
County of St. Clair *vs.* Livingston, 23 Wallace 68.
Barney *vs.* Keokuk, 4 Otto 324.
Hoboken *vs.* Railroad Co., 124 U. S. 688, 691.
Packer *vs.* Bird, 137 U. S. 661.
Hardin *vs.* Jordan, 140 U. S. 371.

In Hinman *vs.* Warren, (6 Oregon 411,) the court said:

"Tide lands—those that are uncovered and covered by the ebb and flow of the sea—belong to the State of Oregon by virtue of its sovereignty."

"This doctrine is the clear result of the principle announced in all the cases, from Pollard's Lessees *vs.* Hagan (3 How., 230,) to Barney *vs.* Keokuk, (4 Otto, 323.)

"But it is contended that this sovereingty did not attach until the State was admitted into the Union. This is true, but it is also equally true that the United States Government has no constitutional or statutory authority to so act toward a Territory as to make it impossible to admit such Territory upon an equal footing with the other States of the Union. In all matters which touch the sovereignty the general Government is in the very nature of our system simply a protector thereof until the Territory assumes the ampler power of a State, and becomes, therefore, enabled to assert and protect its sovereignty."

In Parker *vs.* Taylor, (7 Or. 446, 447,) Judge Boise in rendering the decision of the Supreme Court of Oregon, said:

"As before stated the Patent of the United States conferred on the patentee no right to the tide lands lying between high and low water. These were the property of the State and absolutely at its disposal. Its deed gives to them (the grantees of the State) the same fee simple title (to the tide lands) as the patent from the United States gave to the land above high tide."

In Parker *vs.* Rogers, Judge Boise delivering the opinion of the Court and discussing the Oregon act providing for the sale of tide lands by the state, said:

"Though the State was under no legal obligation to recognize the rights of either the riparian owner or those who had acquired these tide lands, still the legislature, considering the facts that these lands had been dealt with as private property and improved sometimes

by the erection of expensive structures which were of great advantage to commerce, made what we think a wise and just provision for the protection of those who had spent their money in purchasing and improving these lands."

In the case at bar the Supreme Court of Oregon, after a critical examination of the previous decisions of that court and the decisions of this court upon the question, said:

"From all this it appears that when the State of Oregon was admitted into the Union the tide lands became its property and subject to its jurisdictions and disposal; that in the absence of legislation or usage the common law rule would govern the rights of the upland proprietor, and by that law the title to them is in the State; that the State has the right to dispose of them in such manner as she may deem proper as is frequently done in various ways and whereby sometimes large areas are reclaimed and occupied by cities, and are put to public and private uses, State control and ownership therein being supreme subject only to the the paramount right of navigation and Commerce."

"*The whole question is for the State to determine for itself; it can say to what extent it will preserve its rights of ownership in them or confer them on others.*"

These decisions of the Supreme Court of Oregon have become a rule of property in that state upon the faith of which valuable property has been transferred and large expenditures for improvements have deen made.

In Weber *vs.* Harbor Commissioners, 18 Wallace 65, Mr. Justice Field, delivering the opinion of the court said:

"Nor is it necessary to controvert the proposition that in several of the States, by general legislation or immem-

orial usage, the proprietor, whose land is bounded by the shore of the sea, or of an arm of the sea, possesses a similar right to erect a wharf or pier in front of his land extending into the waters to the point where they are navigable. *In the absence of such legislation or usage, however, the common law rule would govern the rights of the proprietor, at least in those States where the common law obtains. By that law the title to the shore of the sea, and of the arms of the sea, and in the soils under tidewaters, is in England, in the king, and, in this country, in the State.* Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a *purpresture*, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise."

In County of St. Clair *vs.* Lovingston, 23 Wallace, 68, Mr. Justice Swayne, delivering the opinion of the court, said:

"By the American Revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them," citing Martin *vs.* Waddell, 19 Peters, 347; Russell *vs.* The Jersey Co., 15 Howard, 426.

"The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the states respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones," citing Pollard's Lessee *vs.* Hagan *et al.*, 3 Howard, 212; Pollard *vs.* Kibbe, 9 Id. 471; Hallett *vs.* Bute, 13 Id. 25; Withers *vs.* Buckley, 20 Id. 84.

In Barney *vs.* Keokuk, 4 Otto 338, Mr. Justice Bradley, delivering the opinion of the court, said:

"The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad difference ex-

isting between the extent and topography of the British Island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in Martin *vs.* Waddell, 16 Pet. 367, Pollard's Lessee *vs.* Hagan, 3 How. 212, and Goodtitle *vs.* Kibbe, 9 Id. 471. These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable water. And since this court, in the case of the Genesee Chief, 12 Id. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. *It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water.*"

In Hoboken *vs.* Railroad Co., 124 U. S. 688, 691, a recent case, this Court held in favor of the right of the State to dispose of tide lands and to cut off the access of the riparian owner from his land to the water without compensation to him for his loss—the subject being one wholly within the control of the state. The case of *Stevens vs. Peterson* &c., *Railroad*, 34 N. J. Law 532, is

cited as correct exposition of the power of the state of New Jersey to dispose of these lands. The court says:

"Having in view the manifest policy of this legislation and the meaning of its language, we do not hesitate to adopt the conclusion that the several grants * * * * * * under which the defendants claim were intended to secure to the grantees the whole beneficial interest and estate in the property described for their exclusive use for the purposes expressed and intended in the grants * * * * In other words, under these grants the land conveyed is held by the grantees on the same terms on which all other lands are held *by private persons under absolute titles*, and every previous right of the state of New Jersey therein, whether proprietory or sovereign, is transferred or extinguished, except such sovereign rights as the state may lawfully exercise over all other private property." (Page 691.)

In Packer *vs.* Bird, 137 U. S., 661, the court holds that the rights of the riparian owner where the waters are above the influence of the tide, will be limited according to the laws of the state, either low or high water mark or will extend to the middle of the stream. (669.)

In Hadin *vs.* Jordan, 140 U. S., 371, the court say:

"With regard to the grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high water mark and that the title to the shore and lands under water in front of the lands so granted enures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto and held in trust for the purposes of navigation and fishery—and

cannot be retained or granted out to individuals by the United States (citing *Pollard vs. Hagan* and other cases.) Such title being in the state, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The state may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them and granting fisheries in particular localities; and also by the reclamation of submerged flats, and the erection of wharves and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities *and are put to other public and private uses, state control and ownership therein being supreme, subject only* to the paramount authority of Congress in making regulations of commerce and in subjecting the lands to the necessities and uses of commerce."

This is, I think, the most recent case bearing on the subject. It is in conformity with all the decisions of this court. The authority of the state to dispose of these lands absolutely to any use public or private, subject only to the paramount authority of Congress to protect commerce, is placed beyond question. There are no rights of upland ownership to interfere with this authority. The adjacent owner has only such rights as the respective states see fit to give them.

The Legislative Assembly of Oregon, in 1872, passed an act providing for the sale of tide lands, which act was amended in 1874. It was under these acts that the defendant in error applied to the Board of Commissioners for the sale of school lands of the State of Oregon to purchase the tide lands described in the complaint were held to be entitled to purchase the same and received a conveyance therefor.

The portions of said act, 1872, as amended in 1874, material to the present inquiry, are as follows:

"SECTION 1. That the owner or owners of any land abutting, or fronting upon, or bounded by, the shore of the Pacific Ocean, or of any bar, harbor, or inlet of the same, or rivers and their bays in which the tide ebbs and flows, within the State, shall have the right to purchase all the tide land belonging to this State in front of the lands so owned.

"SEC. 2. The officers of this State who are now or who hereafter may be authorized to dispose of the school lands belonging to the State," (the Governor, the Treasurer, and the Secretary of State,) "are authorized, empowered, and directed to sell such tide lands upon proper application to purchase, by parties authorized to purchase.

"SEC. 3. Every applicant for the purchase of tide land, under Section 1 of this act, shall, with his application, present to the officer or officers who are or shall be authorized to sell such tide lands the evidence of his title to land which abuts, or fronts upon, or is bounded by, such tide lands, and before making such sale such officer or officers shall be satisfied that such applicant is the owner of such lands so abutting, or fronting, or bounded, as aforesaid.

"SEC. 4. The value of such tide lands shall be appraised at a certain sum per acre of the same, and such appraisal shall not value the lands at less than $1.25 for each acre of such lands: *Provided*, The board having in charge the sale of such lands shall have power to set aside any appraisement, on evidence taken of the true value of the same, and shall make another and true appraisement based on such evidence.

"SEC. 5. If any person or persons who at the passage of the act, of which this is amendatory, were entitled to purchase any tide lands under the provisions of Section 1 thereof shall not have applied for the same within three years from the passage of said act, or having made such application has failed to prosecute the same according to law, then such lands shall be open to purchase by any other person who is a citizen and a resident of the State of Oregon: *Provided*, That when any application shall be made for the purchase of any such tide land by any per-

son or persons other than the owner or owners of the lands adjacent to such tide lands, or the purchaser or purchasers of such lands from such owner of adjacent lands, or some previous owner thereof, notice shall be given by said board to the owner or owners of such adjacent lands, or to any parties who are in possession of or who shall have improved such tide lands in any manner, and such owner or owners of such adjacent lands, or the person in possession of such tide lands by purchase from such owner of such adjacent lands, or any previous owner thereof, or who shall have improved the same, shall have sixty days after the service of such notice to make application for the purchase of such tide lands, and such application shall have preference over all others, and all applications to purchase tide lands by the owner of adjacent lands shall be accompanied by the affidavit setting forth that such land is not held by any other person under a deed from said applicant, or any person under whom he holds."

Section 5 of this act is somewhat vague, but the evident meaning of the whole act is, that the shore owner is entitled to purchase the tide land in front of him, unless he or some one under whom he holds the title to the shore has transferred his right to purchase the tide land in front of the shore to another, who, in such a case, is entitled to purchase it from the State.

From the bill it appears that defendants in error were the persons designated by the law as having the right to purchase.

It will be seen that the Oregon State law prefers the riparian owner as a purchaser of the tide lands in front of him, unless he has sold and conveyed his right to purchase the tide lands to another, in which case it prefers his grantee. Deeds from the riparian proprietors for tide lands while they thus conveyed no title as against the State, were recognized by the State law providing for the sale of tide lands as sufficient to give the grantees a preference right to purchase as against the grantors.

IV.

The defendants in error were awarded the tide lands in question upon application "according to the rules of the Board of School Land Commissioners." (Record, folios 14 and 15.)

Section 5 of the Oregon Act providing for the sale of tide lands requires notice to be given to all parties who could be adversely interested. It is not claimed that notice of the application of defendants in error to purchase the lands in question was not given to the plaintiff in error or his grantor. It may be presumed that the right of the defendants in error to purchase was contested. If not, the plaintiff in error has not attempted to excuse his default.

The decision of the Board of Commissioners appointed by the legislature of Oregon to make sale of the State's tide lands, was, and is in the absence of fraud or error of law conclusive as to the right of defendants in error to purchase the same.

Warren *vs.* Van Brunt, 19 Wall., 646.
Shepley *vs.* Cowan, 1 Otto, 330, 340; besides many earlier cases.
Johnson *vs.* Towsley, 13 Wall., 73.
Connor *vs.* Wallace, 47 Cal., 461.
Rutlege *vs.* Murphy, 51 Cal., 388.

V.

Act of October 17, 1862.

A claim was made by plaintiff in error in the court below of a right of wharfage under an act of the Oregon legislature, approved October 17, 1862 (Sec. 4227 Hill's

Code), and decided adversely to him. The court in passing upon this claim said:

"It is true the legislature of this State had made provision by which the upland owner within the corporate limits of any incorporated town might build wharves prior to the acts of 1872 and 1874, *supra*, but within the purview of our adjudications it would, as a matter of power, have been equally competent to have given this privilege to others. (Sec. 4227, Hill's Code.) But this act is not a grant. It simply authorizes upland owners on navigable rivers within the corporate limits of any incorporated town to construct wharves in front of their land. It does not vest any right until exercised. It is a license, revocable at the pleasure of the legislature until acted upon or availed of. (Eisenbach *vs.* Halfield, 2 Wash., 250.) Shively did not avail himself of the license, nor is there any pretense to that effect. The plaintiffs have built a wharf upon and in front of their tide land. If the act is as applicable to tide lands as upland on navigable rivers, they have exercised the right. The language of the act is: 'The owner of any land lying upon any navigable stream or other like water,' which would seem to apply to the owner of tide land; but, however this may be, the act has already received a construction from this court. In Parker *vs.* Rodgers, *supra*, after quoting this language of the act, Boise, J., said in speaking for the court: 'We are aware that it is a general rule that what is appurtenant to land passes with it, being an incorporeal hereditament, but the right to build a wharf on the land of the State below high water is a franchise which attaches to the tide land, and is appurtenant to it rather than to the adjacent land, for it can be severed from the adjacent land and enjoyed without it.' This is predicated upon the idea that without the act an upland owner would have no right to build a wharf over the land of the State or tide lands, because the right or franchise attaches to the tide land and is appurtenant to it, and not to the adjacent land. The grantor of the defendants did not avail himself of the license under the act, but the

plaintiffs, as owners of the tide lands, have built a wharf, and in view of our adjudications it is difficult to understand from what other source the right claimed by the defendants is to be derived."

This claim was based upon a statute of Oregon. Its decision did not involve a Federal question reviewable in this court, and if the decision were subject to review in the court, it would be affirmed in accordance with the well-established principle that the construction placed on local laws by the highest court of a State will be followed by this court.

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